N. Y. State. Supreme Court. Appellate Div.
Second Department.

In the matter of the application of the Directors of the NATIONAL GRAMOPHONE CORPORATION OF NEW YORK for a voluntary dissolution.

Peter B. Olney & George Carlton Comstock, copartners, comprising the form of Olney & Comstock, Appellants; Eugene V. Daly, Receiver of the National Gramophone Corp. of New York, Respondent

1903.

APPEAL RECORD (from an order of the Supreme Court, made at the Westchester Special Term)

New York. Courts. Appellate Division
Second Department, April Term 1903,
October Term, 1903.

In the Matter of the Application of the Directors of the NATIONAL GRAMOPHONE CORPORATION OF NEW YORK for a Voluntary Dissolution.

Peter B. Olney and George Carlton Comstock, Copartners, Composing the Firm of Olney & Comstock, Appellants; Eugene V. Daly, Receiver of the National Grampphone Corporation of New York, Respondent.

Decisions

Reported in 82 N.Y. State App. 593-596
87 N.Y. State App. 76-78

the referee, and the judgment entered upon his report should be affirmed.

Section 3411 of the Code of Civil Procedure provides that costs in mechanics' lien suits rest in the discretion of the court, and may be awarded to the prevailing party. In the court below costs were awarded against the appellants in favor of the owner, and objection is made to this feature of the judgment on the ground that he was not the prevailing party, but that the plaintiff (the first lienor) prevailed. The only issues which appear to have been litigated, however, were those between the owner and these appellants, and as to such issues and as between these parties the owner is certainly the prevailing party.

WOODWARD, HIRSCHBERG, JENKS and HOOKER, JJ., concurred.

Judgment of County Court of Suffolk county affirmed, with costs.

In the Matter of the Application of the Directors of the NATIONAL GRAMOPHONE CORPORATION OF NEW YORK for a Voluntary Dissolution.

PETER B. OLNEY and GEORGE CARLTON COMSTOCK, Copartners, Composing the Firm of OLNEY & COMSTOCK, Appellants; EUGENE V. DALY, Receiver of the NATIONAL GRAMOPHONE CORPORATION OF NEW YORK, Respondent.

Motion — a failure to state whether a previous application has been made — it is a mere irregularity — refusal to allow a recital, in an order, of such objection — review of, on appeal.

A failure to comply with rule 23 of the General Rules of Practice, which requires that the moving papers used upon an *ex parte* application for an order shall state whether a previous application for such order has been made, is a mere irregularity.

Preliminary or other formal objections, taken on the argument of a motion and ruled on by the court, should be stated in the order for the purposes of review; if, however, the order does not contain such a recital, the Appellate Division will not reverse an order denying a motion to resettle the order by inserting the recital unless it appears that the appellant has been prejudiced by the omission.

APPEAL by Peter B. Olney and another, copartners, composing the firm of Olney & Comstock, from an order of the Supreme Court, made at the Westchester Special Term, and entered in the office of the clerk of the county of Westchester on the 3d day of February, 1903, denying a motion to resettle an order dated January 6, 1903, which vacated an order entered in said clerk's office on the 25th day of October, 1902, directing the payment of certain moneys to them by the permanent receiver of said corporation.

J. Noble Hayes [*Leslie R. Palmer* with him on the brief], for the appellants.

James F. Horan, for the respondent.

WOODWARD, J.:

On October 25, 1902, upon motion of the attorneys of the petitioning directors of the above-named corporation, an order was made at Special Term directing the permanent receiver of said corporation to pay out of the fund in his hands, as such receiver, to said attorneys the sum of $1,762.32, "in payment of their services and disbursements in the matter of the dissolution of the National Gramophone Corporation of New York to April 5, 1902."

On November 12, 1902, the receiver presented to the same judge who made the order of October twenty-fifth, his affidavit declaring that for certain reasons therein stated he could not with safety pay the amount directed to be paid by that order; asking the court's instructions in certain matters pertaining to the receivership, and praying for a stay of the order of October twenty-fifth until the determination of certain matters specified in said affidavit. Upon this affidavit and all the records and proceedings in said matter, an order was made requiring the attorneys upon whose motion the order of October twenty-fifth was made to show cause, at a time and place therein stated, why an order should not be made as prayed for by said receiver.

The motion under this order to show cause came on for hearing on January 6, 1903, before the same judge who made the order of October twenty-fifth. The attorneys to whom payment was directed by the order of October twenty-fifth appeared and verbally opposed the

granting of the prayer of the receiver, urging as a preliminary objection that the moving papers were fatally defective in that they failed to state whether a previous application for the order had been made, as required by rule 25 of the General Rules of Practice. No affidavits were read or filed by the appellants.

On January 6, 1903, an order was made, in response to the prayer of the receiver, vacating the order of October twenty-fifth, and directing payment of $750 to the attorneys to whom payment of $1,762.32 had been directed by the order of October twenty-fifth, upon performance by them of certain conditions therein specified; "with leave" to the said attorneys "to make further application for an additional allowance of $1,000."

On January 17, 1903, upon the return of an order to show cause granted on the application of the attorneys claiming to be aggrieved by the order of January sixth, a motion to resettle said order was denied by the same judge who had made both of the previous orders. From this order denying resettlement this appeal is taken.

It is urged by the appellants that the recitals of the order of January sixth do not truthfully and fairly state the proceedings had upon the argument of the motion for said order; that certain proper recitals were omitted therefrom; that certain affidavits are therein referred to as having been read on said argument which were not served with the motion papers, nor in fact read at that time; and that the order as entered does not conform to the court's decision, and was improperly entered without notice of settlement. While it is true that preliminary or other formal objections taken upon the argument and ruled on by the court should ordinarily be recited in an order for purposes of review on appeal, we do not believe that the appellants were in any way prejudiced by the omission from the recitals of the order of January sixth of the objection relative to the receiver's failure to comply with rule 25. It has been repeatedly held that this defect is merely an irregularity. (*Bean* v. *Tonnelle*, 24 Hun, 353; *Skinner* v. *Steele*, 88 id. 307; *Wooster* v. *Bateman*, 4 Misc. Rep. 431; 53 N. Y. St. Repr. 562; *People ex rel. Brodie* v. *Cox*, 14 id. 632; *Pratt* v. *Bray*, 10 Misc. Rep. 445.) The order of January sixth of which resettlement was refused, leaves the appellants free to make further application for the additional amount to which they deem themselves entitled; it imposes no conditions that

cannot easily be fulfilled, and affects no substantial right of the appellants. In substance it is quite as favorable to them as the order they themselves propose as a substitute.

No substantial right of the appellants being affected this court cannot disturb the order appealed from. "Whether a court shall modify or change an order already made by it is a question addressed to its discretion, and over its exercise an appellate court has no control." (*Place* v. *Hayward*, 100 N. Y. 626.) To the same effect are *Waltham Manufacturing Co.* v. *Brady* (67 App. Div. 102); *Wadsley* v. *Houck* (27 id. 630); *Sexton* v. *Bennett* (17 N. Y. Supp. 437). These decisions are not in conflict with *Gleason* v. *Smith* (34 Hun, 547) and *New York Rubber Co.* v. *Rothery* (112 N. Y. 592). In these cases the orders appealed from were orders denying motions to resettle cases on appeal. From such orders appeals are expressly allowed by section 1347, subdivision 1, of the Code of Civil Procedure.

The order appealed from should be affirmed.

GOODRICH, P. J., and HOOKER, J., concurred; HIRSCHBERG, J., concurred in result.

Order affirmed, with ten dollars costs and disbursements.

OTTILIE MARIE STEINWAY and Others, Infants, by OTTILIE C. RECKNAGEL, their Guardian ad Litem, Respondents, *v.* LOUIS VON BERNUTH, as Executor and Trustee of and under the Last Will of GEORGE A. STEINWAY, Deceased, and Others, Appellants.

Equity — executor's accounting — the failure of the plaintiff to establish a conspiracy, where it is found that an executor was actuated by motives of self-interest in not resisting a claim against the estate, does not require the Supreme Court to remit the case to the Surrogate's Court — right to a trial by jury of the question of ownership of personal property — when waived — costs against the executor.

June 24, 1895, Ottilie C. Steinway, the wife of George A. Steinway, left New York for North Dakota, for the purpose of securing a divorce from her husband, who was dissolute in his habits. Her action in this respect was approved by her husband's family, and, on the day that she left New York for North

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RECORD
APPELLATE DIVISION
SUPREME COURT
SECOND DEPARTMENT

IN RE F.-W.

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1903

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SUPREME COURT,

APPELLATE DIVISION, SECOND DEPARTMENT.

IN THE MATTER

of

The Application of the Directors of the National Gramophone Corporation of New York for a Voluntary Dissolution.

Printed Papers on Appeal from Order of Hon. Justice Keogh, made at Special Term, dated January 6, 1903, and entered January 8, 1903, vacating an Order of October 25, 1902.

OLNEY & COMSTOCK,
Attorneys for
Petitioners and Appellants,
68 William Street,
New York City.

E. V. DALY,
Receiver and Attorney for
Receiver, in person, Respondent,
~~192 Broadway,~~ 76 William St.
New York City.

New York:
CHAS. P. YOUNG, LAW REPORTER AND PRINTER,
108 Fulton St. [Tel., 1275 John.]

1903.

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New York Supreme Court

WESTCHESTER COUNTY.

IN THE MATTER

of

The Application of the Directors of The National Gramophone Corporation of New York for a Voluntary Dissolution.

2

Statement.

This is an appeal from an order made herein on January 6th, 1903, and entered on January 8th, 1903, vacating an order of October 25th, 1902.

The original motion on which said order was entered was to stay the payment of fees and disbursements to the attorneys for the petitioners herein, as required by an order made and entered herein on October 25th, 1902, confirming the report of the Referee as to said fees and disbursements. A motion was made to resettle the order of January 6th, 1903, which motion was denied, and the order denying the resettlement was affirmed on appeal by the Appellate Division of the Supreme Court, Second Department.

3

There have been no changes of attorneys or parties.

4 **Order of January 6, 1903, appealed from.**

At a Special Term of the Supreme Court, held in and for the County of Westchester, at the Westchester County Court House at White Plains, on January 6, 1903.

Present:

HON. MARTIN J. KEOGH,

Justice.

5 IN THE MATTER

of

The Application of the Directors of The National Gramophone Corporation of New York for a Voluntary Dissolution.

On the regular coming on of a motion by the Receiver for instructions from the Court, which motion comes up under an Order to Show Cause made
6 by Mr. Justice Keogh, dated November 12, 1902.

Now, on reading and filing the said Order to Show Cause and the affidavit of E. V. Daly, verified November 12, 1902, and on due proof of due service of such Order and Affidavit on Olney & Comstock, on the Attorney General of the State of New York, on Waldo G. Morse and on Moody & Getty, attorneys for certain stockholders and creditors, and after hearing E. V. Daly, the Receiver, in person, and Leslie R. Palmer, of counsel for Olney & Comstock, the said Receiver having called the attention of the Court to the fact that there is no proof on file of the service of the notice of filing the Referee's

Report on the Attorney General, Waldo G. Morse and Moody & Getty. 7

And the Court having ordered a resubmission of the whole matter covered by the Order herein made October 25, 1902, and on said resubmission the Receiver having submitted a copy of the affidavit to Mr. George Carlton Comstock on file in the United States Circuit Court, in suit *Universal Talking Machine Company* vs. *American Graphophone Company*, and a copy of an affidavit of Mr. Frank J. Dunham, on file in said suit, and due deliberation being had, now, on reading and filing all of the papers above named, and on all the papers and proceedings herein,

8

IT IS ORDERED that the Order herein made October 25, 1902, be and the same hereby is, in all respects, vacated and set aside;

AND IT IS FURTHER ORDERED, on proof being submitted to the Receiver of the service of notice of the filing of the Referee's Report on the Attorney General, on Waldo G. Morse and on Moody & Getty, or their admission of due and timely service of notice of said filing, or their consent to this order, that Eugene V. Daly, the Receiver herein, pay out of the funds on deposit to his credit in the Union Trust Company, to Messrs. Olney & Comstock, the sum of $750, hereby allowed them, for their services and disbursements herein; with leave to Olney & Comstock to make further application for an additional allowance of $1,000; nothing contained in this Order or in said Referee's Report shall be to the prejudice of the Receiver or of any creditor or stockholder of the corporation in any action, proceeding, now pending or hereafter to be brought or elsewhere. 9

The Receiver shall not make such payment of $750, as above directed, until proof has been submitted to him of service more than eight days previ-

10 ous, of a certified copy of this Order as required by Chapter 378, of the Laws of 1883.

IT IS ORDERED that the said Union Trust Company, upon presentation of a copy of this Order, without any liability whatever to said Union Trust Company, pay the draft of said Receiver for said sum of $750.

MARTIN J. KEOGH,
J. S. C.

Order to show cause, read in support of motion.

11

SUPREME COURT,
WESTCHESTER COUNTY.

IN THE MATTER
of
NATIONAL GRAMOPHONE CORPORATION.

12 On the annexed affidavit of E. V. Daly, verified November 12, 1902, and on all the papers and proceedings herein, let Messrs. Olney & Comstock, the Attorney General of the State of New York, Waldo G. Morse and Moody & Getty, attorneys for certain creditors and stockholders, show cause at a Special Term of this Court to be held at White Plains, Westchester County, on Saturday next, November 15, 1902, why an order should not be made staying the Receiver from making any payment to Messrs. Olney & Comstock under the order granted herein October 25, 1902, until the final determination of a suit instituted by the Receiver against Messrs.

Olney & Comstock, or until the final determination of any appeal that may be made by any of the parties from said order granted on October 25, 1902, and until such other date as to the Court may seem proper.

Let said parties or their attorneys also, at the same time and place, show cause why the Court should not instruct the Receiver as to whether or not said Receiver shall appeal from said order made October 25, 1902, or if said Receiver's time to appeal expires before the entry of an order on this motion and he takes an appeal, why he should not prosecute such appeal; or why the Court should not otherwise instruct the Receiver in the premises or make such other order in the premises as to the Court may seem just.

In the meantime and until the service on the said Receiver of a certified copy of an order vacating the stay herein granted, let the Receiver be stayed from making any payment under said order and let the other parties hereto above mentioned be stayed from taking any proceedings under said order made October 25, 1902.

Sufficient cause therefore appearing, let service of a copy of this order and annexed affidavit at the offices of the attorneys above named before 12 o'clock noon of November 14, 1902, be sufficient.

November 12, 1902.

MARTIN J. KEOGH,
J. S. C.

16 **Affidavit of Eugene V. Daly, recited in order of January 6, 1903, read in support of motion.**

SUPREME COURT,

WESTCHESTER COUNTY.

In Re

NATIONAL GRAMOPHONE CORPORATION.

17 COUNTY OF NEW YORK, ss:

Eugene V. Daly being duly sworn, says: "As Receiver herein, I cannot, with safety, pay the amount directed to be paid by order made October 25, 1902, until the time to appeal expires, of the Attorney General and the other parties herein.

Deponent respectfully asks the instruction of the Court as to the propriety of taking an appeal from the said Order and refers to the testimony and brief of the Receiver as to this point. The amount involved is about $1,700.

The Receiver has instituted an action against the
18 firm to whom said payment is directed to be made, to recover about $2,700. Until the determination of that suit, as it is for moneys had and received, it is submitted that there should be a stay which should also be granted by reason of the fact above stated that the time of the other parties to appeal has not expired.

Deponent says that he now has under preparation the papers in a suit to be brought by the Receiver for maladministration of the corporation's affairs or for the recovery of moneys and property on the ground that certain persons filling fiduciary positions toward the corporation acted in behalf of the other interests to the injury of the creditors and

stockholders of the corporation, deponent has not yet determined as to whether Mr. Comstock should be made one of the parties defendant in such an action. 19

For all of the reasons above stated, deponent asks for a stay of the order granted October 25, 1902. The next Special Term in Westchester County is to be held November 15, 1902, and therefore an order to show cause on short notice is necessary.

E. V. DALY.

Subscribed and sworn to before me this November 12, 1902.

LEWIS R. CONKLIN,
Notary Public,
Orange County. 20

Certificate filed in New York County.

Affidavit of George Carlton Comstock, recited in order of January 6, 1903, as being read in support of motion.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNIVERSAL TALKING MACHINE COMPANY,
Complainant,

against

AMERICAN GRAPHOPHONE COMPANY, *et al.* 21

COUNTY OF NEW YORK, ss.:

GEORGE CARLTON COMSTOCK, being duly sworn, deposes and says:

I am of counsel to The Universal Talking Ma-

22 chine Company, the complainant herein, and also
The Universal Talking Machine Manufacturing
Company, which is the agent of the complainant
manufacturing and selling Disc Talking Machines.
As such counsel I have had charge, since April
1901, to date (a) of the license agreement in ques-
tion herein between the complainant herein and
The American Graphophone Company, one of the
defendants herein, and (b) the arrangements made
by the said complainant with one Edward S. Ennis,
and later with the said Universal Talking Machine
Manufacturing Company, so that the business of
the complainant, in manufacturing and selling Disc
Talking Machines, under the license in question
23 herein, might not be interfered with or discon-
tinued.

I therefore make answers as follows to the alle-
gations contained in the affidavits filed by the de-
fendants in opposition to complainant's motion for
an injunction.

Mr. Mauro, in his affidavit, refers, on the first
page, to an interview between himself and Mr.
George H. Robinson, the complainant's president,
and states:

First: That, long prior to that interview, The
Universal Talking Machine Company, the licensee,
24 had ceased to do business under the license in ques-
tion; and,

Second: That at the time of the interview it was
a fact, and was well known, that The Universal
Talking Machine Company was wholly insolvent,
and that the said license was treated by both parties
thereto as terminated.

Mr. Mauro is absolutely mistaken in both of these
statements, neither statement being, in whole, or in
any part, correct, as I shall hereafter show in this
and in the annexed affidavits.

Mr. Mauro, on the third page, states that he was
visited by me, and that my attitude toward the

license in question was that it was of no value whatever, etc. Mr. Mauro's version of this conversation is incorrect, and conveys a wrong sense of the substance of the conversation. It is altogether incorrect in stating that my attitude was that the license was of no value whatever. I shall hereafter state this interview as it occurred, together with the connecting circumstances. 25

On the fourth page Mr. Mauro states that in the conversation between himself and Mr. Robinson the license of The Universal Talking Machine Company was not asserted. This is wholly incorrect, as it was strongly asserted at the time.

As to my letter of March 31, 1902, Mr. Mauro has not given the entire letter. I shall give it in this affidavit, and it will show that The Universal Talking Machine Company was still doing business, and manufacturing under the license. 26

With reference to the allegations in the various affidavits, showing a sheriff's sale of The Universal Talking Machine Company's property, I will show that this sale was made under an arrangement whereby it would inure to the benefit of The Universal Talking Machine Company, and enable it to continue in business without debts, so that it would no longer be insolvent, or be hampered by creditors.

I became counsel for The Universal Talking Machine Company about the first of April, 1901, at which time The Universal Talking Machine Company was manufacturing machines adapted to reproduce from zig-zag records, under the license in question herein, and selling the same through its agent, The National Gramophone Corporation, whose relations to it were very analogous to the complainant's present relations with The Universal Talking Machine Manufacturing Company, as is shown by the annexed affidavit of Mr. Frank J. Dunham. From this time until about the middle of September, 1901, I was not called upon with reference to the license in question, or the actions, if 27

any, of the parties under it, with one exception; that is to say, not later than about the first of July, 1901, I was informed of rumors that The American Graphophone Company was going to manufacture Disc Talking Machines, contrary to the provisions of the License Agreement, that agreement being exclusive to the complainant. I thereupon called upon Mr. Mauro, at his office in this City. I told him of the rumor, and asked him point blank if it were true, telling him that I considered the license exclusive. He said that it was not true; but that his understanding was that the license was not exclusive in so far that it permitted The American Graphophone Company to manufacture Disc Record Machines. About the seventeenth of September, 1901, a Receiver of The National Gramophone Corporation had been, or was about to be, appointed, and inasmuch as The Universal Talking Machine Company was almost wholly supplied with its funds to transact business by the Gramophone Corporation, the question as to what would happen to the license agreement between The American Graphophone Company and The Universay Talking Machine Company was placed before me, for my advice, and I then, that is to say, September 17th, 1901, wrote a letter to Mr. Mauro, an extract from which reads as follows:

> "The matter of the Contract between the Graphophone Company and the Universal Company has lately been placed before us for our advice. Before advising the company, however, I would very much like to talk to you concerning it, and in receipting for the check, will you kindly write me when you will be in the City, and at what time, when you are in the City, it will be convenient for you to see me?"

Some time after this I called upon Mr. Mauro, and told him I wanted to tell him the situation, and that was that The National Gramophone Corpora

tion had become wholly insolvent, and would go out of existence; but that we would so arrange it that The Universay Talking Machine Company would continue business, and continue to manufacture and sell Disc Record Talking Machines. Mr. Mauro stated that he would be very glad to have the company get into strong financial hands. There was nothing breathed, up to this time, as to any abandonment of the license. It was thoroughly understood between us, and that was the sense of our conversations, that the license was still in force, and that The Universal Talking Machine Company was manufacturing machines, and doing business under it, and this was the understanding after the sheriff's sale. The sheriff's sale took place on October 28, 1901. Shortly after that sale, to wit: about the first of November, 1901, I wrote to Mr. Mauro with reference to certain litigation in Europe, in which The Universal Talking Machine Company was interested, and I now quote this letter to Mr. Mauro, and his reply to it, to show that the understanding clearly, at that time, to wit: after the sheriff's sale, was that the license agreement was still in force, and The Universal Talking Machine Company still doing business. My letter to Mr. Mauro is as follows:

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32

"November 2, 1901.

"PHILIP MAURO, ESQ.,

"My Dear Sir:

"I wrote Mr. Prescott, at Berlin, what you suggested in answer to mine, asking your company to assist Prescott in obtaining patent on the Zonophone Motor. I to-day received an answer from him, an extract from which I take the liberty of inclosing. I myself do not believe anything of the kind, and am sure that the result of sending you this extract from Prescott's letter will make your company go out of its way to show that there is no truth in his suspicions."

"(Copy)"

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"Berlin, S. W., 68
"October 22, 1901.
"Ritterstrasse, 71.

"GEORGE CARLTON COMSTOCK, ESQ.,
"31 Nassau Street, New York.

"Dear Sir:

"Yours October 12 received. I return you the circular letter 405, as per request; also I return the letter from Parker Smith. I have noted the letter from Mr. Mauro, and am not surprised at its contents. So long as you pay the Graphophone Company a royalty on Zonophone Machines, they are in duty bound not to stand in the way of your getting construction patents upon those machines. I consider the Graphophone Company a help here to the Gramophone Company, in trying to prevent us from obtaining a patent on the Zonophone Motor, a distince breach of good faith, where the relations of one party paying royalties to another should be exceedingly close and cordial. The only reason I can account for the Graphophone Company's position in the matter is that they are going to put their own Disc Talking Machine on the market; and consequently anyone obtaining patents on similar machines are enemies and competitors; and they try to appear friendly, while they accept your royalties, but when it comes to a crucial test of friendship, as in the present instance, their friendship is found wanting. In my opinion, the Graphophone Company will bear very close watching, as I think they will accept your royalties until such time as they are ready to put their own Disc Talking Machine on the market, when they will promptly knife you."

(Signed, F. M. PRESCOTT.)

"Very truly yours,
"GEORGE CARLTON COMSTOCK."

Mr. Mauro answered this as follows: 37

"New York, November 6, 1901.

"GEORGE CARLTON COMSTOCK, ESQ.,
"31 Nassau Street,
"New York City:

"I have yours of the 2d instant, and am obliged to you for communicating to me the contents of Mr. Prescott's letter. I shall not, of course, make any reply to his insinuations, and I am very sure The American Graphophone Company will not go out of its way to disprove his suspicions. If I have not already made it clear, I desire to say that the application which the Columbia Phonograph Company is said to 38
be opposing is one that would cover, not our new Disc Machine, but the standard Graphophone, which we have been making and selling for many years past.

"Yours very truly,
"PHILIP MAURO."

In the meantime, that is to say, on October 28, 1901, the plant of The Universal Talking Machine Company had been seized by the Sheriff, under executions issued at the instance of various judgment creditors, who had obtained judgments against the company. Just prior to the time when these judgments were obtained I had a talk with Mr. George 39
H. Robinson and Mr. Frank J. Dunham, who were the holders of record, as Trustees for The National Gramophone Corporation, of all, or nearly all, of the capital stock of The Universal Talking Machine Company. I advised them to make some arrangement, if possible, to take care of these creditors' claims, in order that the business of The Universal Talking Machine Company, in manufacturing Disc Talking Record Machines, might not be interfered with. This advice I gave partly for business reasons, and partly for legal reasons. The business reasons were that there were orders coming in every day for Disc Record Machines, which it was profit-

able to fill; also that the company had a factory and plant, with a large number of trained employees, whose places it would be difficult to fill if they were discharged by reason of stoppage of business, and obtained other employment. This was notably the case with a Mr. Valiquet, the superintendent of the factory, and Mr. Cheney, who had charge of its laboratory for making records. The main legal reason was that I considered the license with The American Graphophone Company to be of value, and, in any event, of sufficient value to warrant the continuation of the company—that is, of The Universal Talking Machine Company. Messrs. Robinson and Dunham answered that a continuation of the old company meant the payment of all of its creditors, and that, inasmuch as they had not yet ascertained the number of creditors, and amounts of their claims, they were not yet prepared to decide whether or not to continue The Universal Talking Machine Company; and that they thought it best not to pay the claims in suit just at that time, and then, if executions were issued upon these judgments, they would buy in the property for the benefit of the company, and I could arrange with the Sheriff, when he made a levy, so that he would not stop the business, or interfere with the operation of the factory or of filling orders. That in the meantime they would have a thorough investigation made, so that they would soon be in a position to decide whether they would continue The Universal Talking Machine Company or not, and that if they decided not to continue the business, then the plant would still belong to the old company, subject to the repayment to them of whatever they had expended upon the Sheriff's sale in buying in the plant. Executions were issued upon the several judgments, and the Sheriff thereupon made a levy. I, however, arranged with him so that he allowed the business to be continued, the factory to be operated, and orders to be solicited and filled. Thereupon the Sheriff's sale took place

on October 28th, in the morning, and the business of the company was interrupted for about three hours. All of the tangible property of the company was sold, and purchased by Mr. Edward S. Innet, who was acting for Messrs. Dunham and Robinson. The Sheriff, upon the sale, attempted to sell to Mr. Innet, not only the tangible property, but also the intangible property; that is to say, in the patents described in Lot 7, and the contracts and licenses in question, described in Lots 9 and 10, attached to Mr. Hill's opposing affidavit; and although it perhaps would have made no difference I advised The Universal Talking Machine Company that the Sheriff could not deliver anything but the tangible property; and that if Mr. Innet, acting for The Universal Talking Machine Company, intended to continue the business, further action on the part of the company would be necessary as to the patents and contracts. After the Sheriff's sale, to wit: about the 21st of November, 1901, Messrs. Dunham and Robinson advised me that, while they had not finally decided as to whether they would furnish the company sufficient money to continue its business for any length of time, they would, nevertheless, through Mr. Innet, keep on furnishing money to pay the claims of pressing creditors, in order that the business of The Universal Talking Machine Company might be continued until their final decision. In pursuance, therefore, of my advice, and of the offer of Messrs. Dunham and Robinson, the Directors of The Universal Talking Machine Company met, on November 22, 1901, and took action as follows. I quote from the minutes of a meeting of the Directors of The Universal Talking Machine Company, held on November 22, 1901:

> "Mr. Comstock reports that on October 28, 1901, the Sheriff's sale of the tangible property of the company took place, and the property was sold by the Sheriff, and purchased by Mr. Edward S. Innet, acting in behalf of Messrs. Robinson and Dunham and the Reorganization

Committee; and that Mr. Innet, as such Trustee, intends to continue the business of the old Universal Company temporarily, and for a reasonable time, until some plan of reorganization is formulated and acted upon; and that some arrangement should therefore be made with Mr. Innet whereby he should have the use of the remaining property of the company, particularly of the Patents, Trade-Marks and Contracts; and that he is authorized to state for Mr. Innet that, if such arrangement be made, Mr. Innet will continue the business for such reasonable time.

"Mr. Comstock also states that, in order that the remaining property of the company may not be taken and disposed of at the instance of creditors, certain advances of money are immediately necessary, amounting to not less than $4,000.

"Upon motion, duly seconded, it was thereupon unanimously

"RESOLVED, That the officers of this company be directed to accept the offer of Mr. Innet, upon condition that he at once advance to the company, for its own purposes, the sum of $4,000, and also assume the outstanding accounts payable of the company; and, upon such conditions being fulfilled, to transfer to him its interests in Patents, Applications for Patents, and Trade-Mark and Matrices; and also that he be allowed the use and benefit of the contract of this company with The International Zonophone Company and F. M. Prescott, and also L. P. Valiquet and George K. Cheney; and that he be allowed to manufacture, for the account of the company, and as its agent, under license agreement of the company with The American Graphophone Company.

"Mr. Innet, being present, accepted the conditions."

Mr. Innet thereafter advanced the sum he agreed to, and assumed the outstanding accounts payable of The Universal Talking Machine Company, paid them off as they became due, and continued to manufacture and sell, for the account of the company, and as its agent, Disc Talking Machines and Sound Records. He continued under this arrangement until to and including December 31, 1901, when a new company was formed, called The Universal Talking Machine Manufacturing Company. It was organized by the same persons who owned or controlled the stock of The Universal Talking Machine Company, and, except that it was organized as a separate corporation, was the same in interest as the old corporation, that is, as The Universal Talking Machine Company. It was at first intended to change the charter and increase the stock of the old company, and not have a separate corporation, but there were certain reasons why this did not seem feasible just at that time, and therefore the directors and stockholders of the old company decided to organize a new company, which would act to the old company somewhat in the same relationship as the old gramophone corporation, but for a limited time only. One of the principal reasons was that, by reason of the Sheriff's sale, the credit of the old company had become impaired, and it was considered wise that for a while, and until the effect of the Sheriff's sale had passed off, a new corporation, with fresh credit, should do the trading. Thereupon, and preparatory to the new company taking over the business of manufacturing and selling for the account of the old company, the following arrangement between the two companies was made. I quote from the minutes of a meeting of the directors of the old company, held on December 17, 1901:

"Mr. Robinson states that a company called The Universal Talking Machine Manufacturing Company, has been agreed upon by the

52 Committee on Reorganization, and is about to be incorporated, and that it may be necessary to certify to the Secretary of State the right of the new company to use a name similar to that of the present Universal Talking Machine Company; and therefore suggests that some agreement be made whereby such certificate to the Secretary of State may be authorized. Mr. Comstock suggests that, while the new company is formed for the benefit of stockholders of the old company, and that while, in that sense, the formation of the new company might be called a reorganization of the old company, nevertheless he considered it desirable that the
53 distinct entities of each company should be preserved; that therefore a formal agreement should be made, or some formal resolution be passed, covering the relations of the two companies to each other; and thereupon Mr. Comstock suggests the following resolution, that is to say:

"RESOLVED, That the new company be authorized to manufacture and market Disc Talking Machines and Disc Records for the account of the present Universal Talking Machine Company, retaining for its services fifty per cent. of the net profits, after deducting therefrom the
54 fixed dividend on the preferred stock; that is for the services of the new company; the remaining fifty per cent. of the profits to go to the credit of the present company. Also, that the new company pay the remaining outstanding accounts payable of the old company, and the royalties due and to become due by the old company under its license agreement with The American Graphophone Company, all for the account of the old, that is, the present company. That the present company have the right, at any time, under this arrangement, to take back the plant and business, as the same

may be acquired and developed by the new company, at a price not to exceed the cost price to the new company of the plant, plus the amount expended by it in advertising and developing the business, and plus all moneys advanced or used to pay the debts of the old company, with six per cent. interest added; and that, in any event, when the amount of the profits to the present company under this agreement are equal to the price above stated, at which the present company may buy, then the entire business and plant, patents and applications for patents, and trade-marks, shall be transferred or retransferred, as the case may be, to the present company.

"RESOLVED, FURTHER, That this agreement contemplates the use by the new company of the services of Messrs. Valiquet and Cheney, and also the right to act in behalf of the present company under the present company's contracts with Mr. F. M. Prescott and The International Zonophone Company, and also, necessarily, the right to manufacture, use, and sell, but for the benefit, as aforesaid, of the present or old company, Disc Talking Machines and Sound Records, under the license with The American Graphophone Company.

"RESOLVED, FURTHER, That upon compliance of the new company with the conditions aforesaid, it be allowed to make such reasonable use as it sees fit, either in its own title or otherwise, of the name of the present Universal Talking Machine Company.

"RESOLVED, FURTHER, That Mr. Edward S. Innet, acting for stockholders of this company, be requested to transfer to the new company, under the agreement covered by the aforesaid resolution, upon payment to him, in capital stock or otherwise, of such price or sum as he may agree upon with the new company, the

property heretofore purchased by him at sheriff's sale, heretofore conveyed to him by this company."

Thereafter the directors of the new company, that is, of The Universal Talking Machine Manufacturing Company, met and ratified this arrangement, and Mr. Innet transferred to the new company what he had purchased at Sheriff's sale, and also such patents as had been transferred to him, and the new company was allowed the use of the property of the old company still in its name, that is to say, its contracts with Messrs. Cheney and Valiquet, its contract with The International Zonophone Company, and its contract, that is to say, the license in question, with The American Graphophone Company; and the business of the new company is proceeding under this arrangement. On January first, 1902, the new company began active business. It paid off all of the debts of the old company, except certain mortgage bonds, secured by mortgage upon the plant of the old company, which had not matured. It, however, paid the interest called for by these bonds. So that the old company now has no debts except those represented or secured by these mortgage bonds. The debts so paid off amounted to about $10,000. In addition, the new company has spent many thousand dollars in enlarging and improving the plant and factory, so that its sales might be increased and more royalty earned under the license. As a matter of fact, as will be seen by the annexed affidavit of Mr. Robinson, the amount of royalties earned has been largely increased since the new company took hold as agent for the old company. In the meantime, however, The American Graphophone Company had begun to manufacture and sell Disc Record Machines, thus violating the exclusive conditions of the license agreement. While the measures were pending to relieve the financial embarrassment of the old company, the situation was so liable to change that little could be done in enforcing, or attempting to en-

force, the fulfillment of the license agreement upon the part of The American Graphophone Company. When, however, the new company had become established, the Directors consulted and advised with me, and advised that something should be done towards settling the relations of the new company with The American Graphophone Company, adjusting the amount of royalties due, and preventing the Graphophone Company from further violating the exclusive character of the license. I thereupon put myself in communication with Mr. Mauro, and on January 30, 1902, wrote to him as follows: 61

"January 30, 1902.

"PHILIP MAURO, ESQ., 62

"My Dear Sir:

"I should like to see you personally as to the matters between The Universal Talking Machine Company and The American Graphophone Company, and should like the interview to be as soon as you can conveniently make it. Let me know when I can see you."

I thereupon called upon him, and told him that The Universal Talking Machine Company, that is to say, the old company, had made an arrangement by which it could continue in business through an agent; that I desired to fix up the matter of the royalties; that the license agreement provided that one-half the royalties should be paid in to a trust company; that I understood that this was not being done. Mr. Mauro said that an arrangement had been made with the officers, particularly Mr. La Dow, whereby this clause of the license agreement had been waived; and the point thereupon turned upon whether this was so or not; for if The American Graphophone Company was to receive all of the royalty, then the Universal Talking Machine Company still owed it royalties; whereas, if it was to receive but one-half, then it had been overpaid. Mr. Mauro also stated that he did not consider the license exclusive; that the intendment of the license was that The American Graphophone Company 63

64 should have the right to manufacture Disc Records, and not The Universal Talking Machine Company exclusively. He told me that Mr. La Dow knew all about it. I thereupon told him I would see Mr. La Dow. I then talked with the officers of The Universal Talking Machine Company, and thereupon wrote to Mr. Mauro the following letter, which expresses the position of The Universal Talking Machine Company from the very outset:

"February 6, 1902.

"PHILIP MAURO, ESQ.,

"Dear Sir:

"Referring to the license agreement between
65 The American Graphophone Company and The Universal Talking Machine Company, dated April 6, 1900, the position of The Universal Talking Machine Company is as follows:

"*First:* That the license is still in force.

"*Second:* That it is now, and claims to have been at all times, ready to pay the royalties as provided for in the license agreement.

"*Third:* That so far as the persons at present in control of The Universal Talking Machine Company are concerned, their best information is that the company has paid, and
66 perhaps more than paid, the royalties provided for by the agreement.

"*Fourth:* That under Clause Seventh of the agreement, your company should purchase such Talking Machines, Sound Records and accessories as you are using in Disc Machines, from The Universal Talking Machine Company.

"*Fifth:* Following this last, that the license is an exclusive license to The Universal Talking Machine Company, so far as Talking Machines constructed and organized to reproduce from zig-zag records are concerned, and, except in so far as the agreement provides that

your company should be a selling agent, the license also excludes your company. 67

"In explanation of the above, the books of The Universal Company show that the amount of royalty which should have been credited up to September 17th is $8,746.67, and from September to December 31st $1,097.30, making a total of $9,842.97. On account of this your company has received, in cash and merchandise, $8,539.10. Under the Third Condition of the agreement, however, but one-half of the royalty should have been paid to you; that is to say, there should have been paid to you $4,921.48. The other half should have been paid into the trust company. Your company 68
has, therefore, been overpaid $3,617.51, which amount should have been paid into the trust company, our company paying in the balance of $1,303.78. May I ask you to make definite answers as to whether you agree to each one of our several positions, as given above, and, where you disagree at all, please state in what respects you disagree, and the reason for such disagreement. We should also be glad to receive from you, in case you substantially disagree with any of our positions, any suggestions as to an adjustment of the disagreement, which suggestions would include arrangements 69
as to the future relations between the two companies.

"Thanking you in advance, we are,
"Yours very truly,
"GEORGE CARLTON COMSTOCK."

On February 7 Mr. Mauro answered me as follows:

"New York, February 7, 1902.
"GEORGE CARLTON COMSTOCK, ESQ.,
"31 Nassau Street,
"New York City.
"Dear Sir:
"I have your letter of the 6th instant, re-

garding the license heretofore granted by The American Graphophone Company to The Universal Talking Machine Company. To reply in full detail to all the points presented would require time for investigation of accounts, etc. I will therefore state briefly the position of The American Graphophone Company on the main points in question.

"1. That the license is no longer in force, having been virtually surrendered by the licensee, who has ceased to do business under it, and whose effects, including the equipment necessary for the business, have been sold at Sheriff's sale.

"2. That failure and refusal to pay royalties is not convincing evidence of readiness to pay.

"3. That the full amount of royalties due under the agreement has not been paid. The modification of contract referred to in your letter was made by the officers of The Universal Talking Machine Company, and the parties have acted under it.

"4. That The American Graphophone Company is not obligated to purchase the articles from The Universal Talking Machine Company.

"5. It was never contemplated or intended that the license should exclude the grantor.

"From the foregoing it will be seen that there are radical disagreements between our respective clients, and I venture to suggest that it would be much easier to arrange a new agreement, adaptable to existing conditions, than to endeavor, by litigation or otherwise, to settle the points in controversy.

"Yours very truly,

"PHILIP MAURO."

Mr. Mauro, a day or two afterward, rung me up, and told me that he would like to arrange an appointment between Mr. Easton, the president of his company, and Mr. Robinson. Owing to the absence of a convenient time of one or the other of these gentlemen, that interview could not be arranged, but I did arrange to meet Mr. Mauro at Mr. Robinson's office, and I there met him on February 14, 1902. Mr. Robinson or myself then substantially repeated to him what I had told him in my letter, namely: that we held that the license was still in force; that we were ready to pay the royalties; and that we wanted the Graphophone Company to purchase from us under the agreement, as we considered that agreement exclusive; and that, as to the engraving process, I told him that I had not investigated sufficiently to determine whether the claims of the patents as to the engraving process of making records (claims entirely distinct from any covered by the license) were valid patents, and that we would consult patent lawyers on that; but that we did not want litigation; we did not believe that was the proper way to do business; and if we could arrange the matter satisfactorily to all parties we would much prefer to do so; and that that was the reason we wanted to get some amicable arrangement if we possibly could. Mr. Mauro repeated his position, as outlined in the letter which I have above quoted at length, and either then gave us a memorandum, being the memorandum stated in his affidavit of what his company would do, or else sent it to me later. We told him that we would consider the matter, and let him know. He said that under no circumstances could they accept royalties now. We told him we were quite willing to pay the royalties, and if there was any dispute as to the trust company arrangement we could leave that to arbitration. I returned to my office, and submitted the question of the engraving process, for an opinion, to Mr. Parker Smith and Mr. H. A. West, both patent lawyers. There was some talk

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76 as to some correspondence on the subject that had passed between Mr. La Dow, the former president of The Universal Talking Machine Company, and Mr. Mauro. I tried to get copies of this correspondence, but had not succeeded on February 21, 1902, and on that day I wrote to Mr. Mauro the following letter:

"PHILIP MAURO, ESQ.,

"My Dear Sir:

"Before deciding upon the premises in the suggestion as to a license for the engraving process, I should like very much to have a copy of the correspondence which I understand
77 passed between yourself and Mr. La Dow on this same matter. We have no copy of the correspondence, either of the letter from you to Mr. La Dow, if any, or of the letter or letters from Mr. La Dow to yourself. I send this note in duplicate to you here and also to Washington.

"Yours truly,

"GEORGE CARLTON COMSTOCK."

At that time I understood Mr. Mauro was in Washington. We thereupon submitted the matter of whether or not the engraving process of making
78 Sound Records was an infringement upon certain claims of the patents to Messrs. West and Parker Smith. Before Messrs. Smith and West had given us their opinions, and before I had further communicated with Mr. Mauro, Mr. Mauro wrote a letter to The Universal Talking Machine Manufacturing Company, claiming that it was infringing some other patent, to wit: a patent called the "Jones Patent." Thereupon wrote to Mr. Mauro that I would investigate that matter, and would let him know in a short time what we intended to do as to that. Thereupon The American Graphophone Company brought three actions against The Universal Talk-

ing Machine Manufacturing Company, and there- 79
upon I wrote Mr. Mauro the following letter:

"New York, March 31, 1902.

"PHILIP MAURO, ESQ.,

"My Dear Sir:

"We were somewhat surprised that through your office there should be instituted suits against The Universal Talking Machine Manufacturing Company for alleged infringement of the Jones Patent, and for alleged infringement of the Bell & Tainter Patents, inasmuch as I wrote to you that I would investigate the matter and report to you my conclusions on a day certain, prior to which day the suits were 80
begun.

"However, I do not know that my conclusions would have changed your course, because, after looking at the Jones Patent, we do not think that it is a valid patent; and, as to the claims of the Bell and Tainter Patent, referring to the engraving process, and without admitting that we infringe these claims, we have come to the conclusion that these claims can not be sustained. As to the Movable Arm, on which the third action has been brought, we think that this is covered by the license to The Universal Talking Machine Company; and while The Universal Talking Machine Manu- 81
facturing Company is not privy to the license, nevertheless it is manufactured under an arrangement with The Universal Talking Machine Company and its licensor. In this case it is manufacturing under the protection of the license. As you know, The Universal Talking Machine Company has been anxious to live up to the terms of the license as they read, and has at all times been willing to fulfill these terms; the only dispute between us, aside from the question which you raise, that the license had terminated, having been as to whether a proportion of the royalties should be paid into the

82 Trust Company, or paid directly to you. Our position, as you know, has been all along that the license has never terminated; that we were acting under it; and that point we shall insist upon. We cannot bring ourselves to conform to your view, that the license has terminated, because such view is not in accordance with the facts as we know them. The only point of our contention being, therefore, that the one-half of the license fees should be paid to the Trust Company, instead of to the Graphophone Company direct, we think that you ought to stipulate with us to allow us to deposit the money in the Trust Company, to the extent of one-
83 half of the royalties, and then agree with us, either to arbitrate or refer the matter, so that we can get to a speedy determination of where the money belongs, if your contention be right in this respect.

"I think this is only fair, in view of the fact that if, in the present condition of The Columbia Phonograph Company and The American Graphophone Company, we should pay it over to either one of these companies, and it should be decided that we were right in our contention, namely, that one-half of the funds should go to the Trust Company, in that case
84 we probably would never get it back from either the Graphophone Company or the Phonograph Company. Kindly let me hear from you at once.

"Very truly yours,

"GEORGE CARLTON COMSTOCK."

Mr. Mauro answered this letter on April 2, 1902, reiterating the position taken by him on February 7, stating that it was manifest to him that the condition of affairs was one which could only be settled by the Courts, and also that the point which I suggested submitting to arbitration or reference presented nothing to either arbitrate or refer.

I thereupon, in answer to this, wrote a letter to 85
The American Graphophone Company, and inclosed it to Mr. Mauro. The letter read as follows:

"April 14, 1902.

"AMERICAN GRAPHOPHONE COMPANY:

"DEAR SIRS:—I send you a statement of the royalty account up to March 31, 1902, inclosed, which, of course, you are at liberty to have verified, in accordance with the terms of the license agreement. The total amounts to $10,574.12. According to the terms of the license agreement, one-half of this sum is $5,287.06. Our understanding of the situation, therefore, is that you should receive $5,287.06, and there 86
should be deposited with the trust company the other half, to wit: $5,287.06. Our books, however, show that you have received $6,039.10. You should, therefore, remit to us $752.04; and if it be true that the amount originally deposited by the company in the trust company was thereafter taken by you, and is not among your debits which go to make up the $6,039.10, this amount also you should return to us, for deposit in the trust company.

"With reference to the claim advanced by Mr. Mauro, to the effect that by permission of Mr. La Dow, or because of some arrangement made by Mr. La Dow, it was agreed between 87
your company and The Universal Talking Machine Company that the amount to be deposited, under the agreement, with the trust company, was to be paid to you direct, I do not find any record of such agreement on the books of the company, or any authority given to Mr. La Dow whereby he had any right to make such arrangement; nor do we find anything whereby we can infer that, if such arrangement were in fact made, there was any consideration therefor. Any further enlightenment on this point that you can afford us we should be glad to receive. So far as the

88 present directors and officials of the company are concerned, they must act upon the written agreements, and what the records of the company show. They desire, however, to live up to the terms of the license, and if such arrangement with Mr. Mauro was in fact made by an officer of the company, duly authorized to make the same, or if the arrangement was of such a nature that it is the company's duty in equity to ratify it, we shall, of course, respect it.

"Yours very truly,

"UNIVERSAL TALKING MACHINE COMPANY,

"By George Carlton Comstock, Attorney."

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This ended the negotiations. I have stated all of the matters at considerable length in this affidavit, even to the extent of inserting as quotations the letters in their entirety. I have done this to emphasize the following facts:

First: That The Universal Talking Machine Company has never gone out of existence or ceased to do business under the license.

Second: That so far as the royalties are concerned, which is the only equity to The American
90 Graphophone Company under the license, the present arrangement of The Universal Talking Machine Company is such that its sales of Disc Record Machines under the license, and consequently the royalties to be paid thereunder, have very greatly increased. And,

Third: That The Universal Talking Machine company has never been insolvent, nor has its property ever been sold, so that the title to the property passed out of its control. And,

Fourth: That it has not only paid royalties according to the terms of the license agreement, but

up to the time of the refusal of The American Graphophone Company to accept further royalties it had overpaid The American Graphophone Company. And, 91

Fifth: That the present contention, advanced in Mr. Mauro's affidavit, that The American Graphophone Company is no longer honoring the license, because of the Sheriff's sale and the alleged insolvency of The Universal Talking Machine Company, is a mere subterfuge, inasmuch as it now appears that The American Graphophone Company, long before the Sheriff's sale, had made preparations to manufacture and sell Disc Talking Machines, in violation of the license agreement; then standing only upon the ground that the license was not exclusive as to it, The American Graphophone Company. And, 92

Finally: That The Universal Talking Machine Company has always been able and willing to pay royalties; and that the only reason that it has not paid royalties is because The American Graphophone Company has refused to accept them.

GEO. CARLTON COMSTOCK.

Sworn to before me, this 7th day of October, 1902. 93

LESLIE R. PALMER,
Notary Public,
N. Y. County.

94 **Affidavit of Frank J. Dunham, recited in order of January 6, 1903.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNIVERSAL TALKING MACHINE COMPANY,

against

95 AMERICAN GRAPHOPHONE COMPANY and COLUMBIA PHONOGRAPH COMPANY.

COUNTY OF NEW YORK, ss.:

FRANK J. DUNHAM, being duly sworn, deposes and says:

I make this affidavit for the purpose of showing that the present relationship between The Universal Talking Machine Company and The Universal Talking Machine Manufacturing Company, with reference to the license in question herein, is similar to
96 the relationship which existed between The Universal Talking Machine Company and The National Gramophone Company, or Corporation, at the time the license in question was made by The American Graphophone Company to The Universal Talking Machine Company. That is to say, at the time the license in question was granted, The American Graphophone Company had a suit pending against The National Gramophone Company, to restrain it from alleged infringement of certain claims of the Bell & Tainter patent, in manufacturing machines constructed to reproduce from zigzag records. The Universal Talking Machine Company was not a de-

fendant in that suit. The Universal Talking Ma- 97
chine Company at that time was owned by The National Gramophone Company (or Corporation), and was its creature. It manufactured Talking Machines, and delivered them exclusively to The National Gramophone Company, or Corporation, and The National Gramophone Company, or Corporation, did all the selling, and provided all the money. All of this was known to The American Graphophone Company when it made the license in question. Thereupon the license in question was given, The National Gramophone Company consenting to a decree by confession as to the validity of the patent, in return for which the license was given to The Universal Talking Machine Company, it 98
being understood that the relations between the two companies would continue as before; that is, The National Gramophone Company, or Corporation, was to continue to do all the selling and marketing, developing the business, and furnishing all the money, while The Universal Talking Machine Company was to continue to be its creature, The National Gramophone Company, or Corporation, owning all of its stock. This arrangement continued up to the time when Mr. Innet came and took the place of The National Gramophone Corporation, acting as Trustee for certain of its stockholders, and for stockholders of The Universal Talking 99
Machine Company. Thereafter The Universal Talking Machine Manufacturing Company took Mr. Innet's place, and has since continued to act towards The Universal Talking Machine Company similarly to the position occupied toward it formerly by The National Gramophone Company, or Corporation, which position was in contemplation and in the minds of the parties when the license in question was made, the only difference in the positions being that, while The National Gramophone Corporation used and sold under the license, The Universal Talking Machine Manufacturing Company manufactures, uses and sells for the account

100 and benefit of The Universal Talking Machine Company under its license. And, furthermore, while in the former case The National Gramophone Corporation took a very large proportion of the profits of The Universal Talking Machine Company, now The Universal Talking Machine Manufacturing Company takes only one-half of the profits for its service, and the business and plant now being developed by The Universal Talking Machine Manufacturing Company is developed not for its own account, but for the account and benefit of The Universal Talking Machine Company.

My knowledge as to the foregoing facts is derived
101 from the fact that I am vice president both of the Universal Talking Machine Company and The Universal Talking Machine Manufacturing Company. I was a director of The National Gramophone Company, and also of its successor, The National Gramophone Corporation, and assisted in advising as to the negotiations which took place between The National Gramophone Company and The American Graphophone Company, at the time the license in question was made.

I reside in the City of New York, and am vice president of The Dunham Manufacturing Company, with offices at 377 Pearl Street, this city.

For myself and my father, I have invested large
102 sums of money in developing the plant and business of The Universal Talking Machine Company, and The Universal Talking Machine Manufacturing Company, as its agent, relying upon the validity of the license in question. The patent covered by the license expires on May 4, 1903, and should the Court refuse to sustain the license at the present time, by a temporary injunction, the value of the license would be almost wholly destroyed, because the action could not be brought to trial, as I am advised, until after the patent had expired. If in this way the value of the license were destroyed, a large proportion of the moneys invested by us, relying

upon this license, would, in my opinion, be wholly lost. 103

FRANK J. DUNHAM.

Sworn to before me, this 7th day of October, 1902.
LESLIE R. PALMER,
Notary Public,
N. Y. Co.

Order of October 25, 1902, vacated by the order of January 6, 1903.

104

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Westchester, at the County Court House, in the village of White Plains, on the 25th day of October, 1902.

Present:

HONORABLE MARTIN J. KEOGH,
Justice.

105

IN THE MATTER
of
The Application of the Directors of The National Gramophone Corporation of New York for a Voluntary Dissolution.

Upon reading and filing the report of Thomas F. Curran, Esq., dated the 21st day of July, 1902, and filed in the office of the Clerk of the County of Westchester on the 22d day of July, 1902; upon the ex-

106 ceptions thereto by Eugene V. Daly, Esq., dated the 5th day of July, 1902, and filed in the office of the Clerk of the County of Westchester on the 26th day of July, 1902; and no other exceptions thereto having been filed;

AND it appearing to me that due service of Notice of this Motion has been made on all persons entitled thereto;

NOW, after hearing Leslie R. Palmer, Esq., of counsel for Olney & Comstock, attorneys for the directors, in support of said motion, and Eugene V. Daly, Esq., in opposition thereto:

107 NOW, on motion of Olney & Comstock, Esqrs.,

IT IS HEREBY ORDERED, That the report of Thomas F. Curran, Esq., Referee, dated the 21st day of July, 1902, be and the same hereby is in all things confirmed.

AND IT IS FURTHER ORDERED, That Eugene V. Daly, permanent receiver of The National Gramophone Corporation of New York, the funds having been turned over by himself, as temporary receiver, to himself, as permanent receiver, pay out of the funds to his credit as permanent receiver in the Union
108 Trust Company of New York, to Olney & Comstock, Esqrs., the sum of one thousand, seven hundred and sixty-two dollars and thirty-two cents, in payment of their services and disbursements in the matter of the Dissolution of The National Gramophone Corporation of New York to April 5, 1902.

AND IT IS FURTHER ORDERED, That The Union Trust Company, upon presentation of a copy of this Order, without any liability whatever to said Union Trust Company, pay the draft of said permanent receiver for said sum.

(Signed) MARTIN J. KEOGH,
J. S. C.

Report of Referee confirmed by the order of October 25, 1902. 109

NEW YORK SUPREME COURT,

WESTCHESTER COUNTY.

IN THE MATTER

of

The Application of The National Gramophone Corporation of New York for a Voluntary Dissolution. 110

To the Honorable,
The Supreme Court of the State of New York.

I, THOMAS F. CURRAN, the Referee duly appointed herein, by virtue of an order, made by the Honorable MARTIN J. KEOGH, *Justice*, the 17th day of July, 1902, do respectfully make this Special Report as to the matters therein contained.

I have taken the testimony of George Carlton Comstock, Esq., J. Noble Hayes, Esq., and Leslie R. Palmer, Esq., as to the services and disbursements of Messrs. Olney & Comstock, as attorneys for the petitioners in this proceeding, and as to the value of such services, and the amount of such disbursements, which testimony is a part of the record heretofore filed in the office of the Clerk of the County of Westchester. 111

I report that the fair and reasonable value of the services of Messrs. Olney & Comstock, as attorneys for the petitioners in this proceeding, up to the time of the commencement of this reference, to wit: the Fifth day of April, 1902, is the sum of Fifteen hundred dollars ($1,500).

112 I further report that Messrs. Olney & Comstock, as attorneys for the petitioners in this proceeding, have necessarily, in this proceeding, expended, on behalf of The National Gramophone Corporation of New York, the sum of Two hundred and sixty-two and thirty-two one hundredths dollars ($262.32), an itemized account of which appears in the testimony. All of the sums making up said total were reasonably and necessarily expended in this proceeding, on behalf of The National Gramophone Corporation of New York, and I therefore report that an order should be made, requiring Eugene V. Daly, Esq., as temporary Receiver of The National Gramophone Corporation of New
113 York, to pay to Messrs. Olney & Comstock the sum of One thousand seven hundred and sixty-two dollars and thirty-two cents ($1,762.32), in payment of their services and disbursements in the matter of the dissolution of The National Gramophone Corporation of New York, up to the Fifth day of April, 1902.

Dated, Yonkers, New York, July 21, 1902.

THOMAS F. CURRAN,
Referee.

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114 **Opinion of the Court.**

"On further examination of papers, I am of opinion that the whole claim, amounting to seventeen hundred dollars ($1,700), of Olney & Comstock, should not be paid at this time. The Receiver may pay seven hundred and fifty dollars ($750), without prejudice to the renewal of this application by the claimant when the Receiver has made further and deeper investigation into the proceedings leading up to the dissolution of the company."

Notice of Appeal.

115

NEW YORK SUPREME COURT.
WESTCHESTER COUNTY.

IN THE MATTER
of
The Application of the Directors of the National Gramophone Corporation of New York for a Voluntary Dissolution.

116

PLEASE TAKE NOTICE that the petitioners and applicants in the above-named proceeding and Peter B. Olney and George Carlton Comstock, co-partners, composing the firm of Olney & Comstock, persons aggrieved hereby, appeal to the Appellate Division of the Supreme Court of the State of New York for the Second Department from the order of the Supreme Court of the State of New York, made herein at a Special Term thereof, held in and for the County of Westchester, dated January 6, 1903, and entered in the office of the Clerk of the County of Westchester on the 8th day of January, 1903, which, among other things, vacated the order of said Court confirming the Referee's report herein and dated October 25, 1902, and from each and every part of said order.

117

Dated, New York, April 28, 1903.

Yours, &c.,
OLNEY & COMSTOCK,
Attorneys for Petitioners
and in person, for persons aggrieved, Appellants,
68 William Street,
Manhattan,
New York City.

118 To

EUGENE V. DALY, ESQ.,
Receiver, and Attorney for
Receiver in person, and Respondent

JOHN CUNNEEN, ESQ.,
Attorney General of the
State of New York.

MOODY & GETTY, *and*
WALDO G. MORSE, ESQ.,
Attorneys for Creditors.

LESLIE SUTHERLAND, ESQ.,
Clerk Westchester County.

119

Certificate of clerk as to papers on file.

STATE OF NEW YORK, } ss.:
County of Westchester, }

I, LESLIE SUTHERLAND, Clerk of the said County, hereby certify that the foregoing consists of certified copies of the Notice of Appeal, the Order Appealed From, and the papers on which the Court below acted in making such order.

120

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 14th day of May, 1903.

[SEAL]

(Signed) LESLIE SUTHERLAND.

Clerk.

J. Noble Hayes

Supreme Court,

APPELLATE DIVISION, SECOND DEPARTMENT.

IN THE MATTER

of

The application of the Directors of the National Gramophone Corporation of New York for a voluntary dissolution.

Appellant's Points.

STATEMENT.

The Appellants, Messrs. Olney & Comstock, the Attorneys for the Petitioners in this proceeding, appeal from an Order of the Special Term made herein on January 6, 1903 (Record, P. 2), which attempts to vacate and set aside a Final Order of the same Court, theretofore made on October 25, 1902, confirming the Report of the Referee, Thomas F. Curran, Esq., awarding the sum of One thousand seven hundred and sixty-two dollars ($1,762) to the said firm of Olney & Comstock, for professional services rendered to, and money advanced on account of, the Petitioners, and directing the Receiver to pay such sum to them; and further ordering that The Union Trust Company pay over such sum to said Olney & Comstock forthwith, upon the presentation of a copy of such Order.

The claim of Olney & Comstock was actively con-

tested by the Receiver, Mr. Daly, much evidence was taken with respect to it, and every possible objection made to it; with the result that the Referee allowed the full amount claimed by the Attorneys, the Court confirming the Referee's Report, upon Motion, and directing payment, as aforesaid.

This Order of Confirmation and Allowance, then, was the Final Order in a proceeding between Olney & Comstock and the Receiver, brought by them, and contested by him, under the above title; *and it has never been appealed from.*

The Receiver seems not to have been satisfied with the result. He was not willing, however, to appeal from the Order finally determining the matter, but has sought to open up the controversy afresh by what is, in the nature of, a collateral attack upon the Order.

After the trial upon the merits, which afforded him an opportunity to raise every possible defense that could be interposed to it by him, and after the Report of the Referee had been confirmed, and a Final Order, tantamount to a Judgment, directing the payment of the sum awarded, had been in force nearly a month, the Receiver, instead of appealing from it, came into Court upon an Order to Show Cause, asking that the execution of this Final Order be *stayed.*

In order to state the point of the appeal clearly it will be necessary to observe, with some particularity, just what this application to the Court was, and the nature of the relief asked for on the Motion. The Affidavit of Mr. Daly, upon which the Order to Show Cause, attacking the Final Order referred to, was based (see Record, pp. 6 and 7), asks for a *stay* of the Order of October 25, 1902, upon two principal grounds, the *first* of which is, that the Receiver had instituted an Action against the firm of Olney & Comstock to recover Two thousand seven hundred dollars ($2,700), and that for that reason the payment directed by the Order of October 25 should be stayed until the determina-

tion of that Action—whenever that might be; and, *second*, that the Receiver had in contemplation an Action against "certain persons filling a fiduciary position toward the Corporation:" and that he might possibly determine to join Mr. Comstock, of the firm of Olney & Comstock, in such Action.

These are the sole reasons given as the grounds for the indefinite stay asked for; and the Order of January 6, 1903, appealed from, must rest upon them; since it appears that when the Motion was heard, and when that Order was granted, the request for instructions as to appeal was obsolete, the time, not only of the Receiver, but of the Attorney General, to appeal having expired.

The Order to Show Cause, issued upon the foregoing Affidavit of Receiver Daly, required Messrs. Olney & Comstock to Show Cause why an Order should not be made, staying the Receiver from making any payment to them under the Order granted herein on October 25, 1902, until the final determination of a Suit instituted by the Receiver against Messrs. Olney & Comstock, &c.; and further, and in the meantime, staying the Receiver and all other persons from making any payment under the said Order, or taking any proceedings under the same.

No other or further relief than above specified was asked for (See Record, pp. 4 and 5).

Messrs. Olney & Comstock appeared, and opposed this Motion, through their Counsel, Mr. Palmer, upon the ground that the moving papers did not present sufficient grounds for the stay asked for. They filed no counter affidavits, but contented themselves with basing their opposition upon the insufficiency of the papers upon which the Motion was made. The Order appealed from (that of January 6, 1903—Record, pp. 2 and 3), as to its mandatory part, starts out as follows (Fol. 8):

"*It is Ordered, That the Order herein, made Oc-*

tober 25, 1902, be, and the same hereby is in all respects vacated and set aside."

That is, the Order to Show Cause asked for merely a *stay*, and it was this Motion that the Appellants were called upon to oppose, and contented themselves with opposing upon the papers upon which the Motion was made.

The Order, however, made by the Court was of an entirely different nature from the Order prayed for, and went the whole length of *vacating* the original Order of confirmation.

It next proceeded, with some seeming inconsistency, to revivify, in part, the Order which it had vacated, by "directing the Receiver herein to pay out of the funds on deposit to his credit with The Union Trust Company, to Messrs. Olney & Comstock, the sum of Seven hundred and fifty dollars ($750), hereby allowed them for their services and disbursements herein, with leave to Olney & Comstock to make further application herein for an additional allowance of One thousand dollars ($1,000)."

The Order then proceeds to impose another important qualification upon the rights acquired by Olney & Comstock under the Order of Confirmation of October 25: It is this—

"Nothing contained in this Order, or in the said Referee's Report, shall be to the prejudice of the Receiver, or of any Creditor or Stockholder of the Corporation, in any Action or Proceeding now pending, or hereafter to be brought, or elsewhere."

The question presented broadly is whether such an Order could have been properly granted upon such an application, and upon such papers.

Whether properly or improperly made, we think it will not be seriously contended that it did not affect *substantial rights* of the Appellants. What those rights were we shall proceed to discuss.

It will be assumed at the outset of the discussion that the questions above suggested are not complicated by the improper recitals contained in the Order respecting the submission by the Receiver of copies of Affidavits used in the United States Circuit Court in another case, nor by the recital of an informal direction of the Court for a resubmission of the whole matter covered by the Order of October 25, or the recital as to the Receiver's having called the attention of the Court to the fact that no proof was on file as to the service of the Notice of Filing the Referee's Report on the Attorney General and Moody & Getty, since it appears by recital in the Order of October 25 that they had Notice of the Motion to Confirm the Referee's Report, and made no objection to it (Fol. 106). These false recitals were brought to the attention of the Court on a separate appeal, heard at the March Term of the Court last. That appeal was taken to clear the way for this appeal; and, if we understand the Opinion of Mr. Justice WOODWARD, this Court refused to interfere, upon the ground that no substantial right of the Appellant was affected by the refusal of the Special Term Judge to resettle the Order by striking out such recitals; and we infer that the Court will regard this Appeal as unembarrassed by such recitals.

The presence of these obnoxious recitals in the Order has, however, made it necessary to print the falsely recited matter, filling 27 pages of the Record from PAGES 7 TO 34, *which was not used on the motion and which this Court did not think it material to strike out.*

POINT I.

It was not competent for this Court, at Special Term, in any event to grant other and different relief from that contemplated by the motion, when the respondent opposed the motion upon the moving papers and offered no counter proofs.

Campbell v. Grove, 2 Johns Cases, 105;
Alcox v. Howland, 6 Cow., 576;
Adams v. Ash, 46 Hun, 105;
Spaulding v. Spaulding, 30 How., 339;
Burns v. Stewart Mfg. Co., 31 Hun, 195.

The Appellants have never had any hearing on the most objectionable feature of the Order Appealed from. It was an Order, in the dark, as to them.

The Moving Papers asked for one thing, the Order made granted several quite different things, and there was no prayer for general relief.

No reason is apparent why this Court should *strain* to uphold an order so irregularly granted, irrespective of its merits.

POINT II.

The order of October 25, 1902, confirming the Referee's report and awarding the sum of $1762 to the appellants, was a final order as between them and the Receiver of the corporation and it could not be properly vacated for the grounds shown nor substantially modified in the manner attempted, the Receiver's remedy being by appeal.

Whether viewed as an attempted exercise of discretion or power the order of January 6th seems to be equally erroneous.

In the first place, sound legal judgment seems to revolt at the proposition, that the mere voluntary *commencement* by the Receiver of "an action against the Appellants, Olney & Comstock, for $2,700," after they have been awarded the full amount of their claim upon *a trial*, presents any sufficient or respectable reason for staying, much less *vacating*, or even modifying the final Order of confirmation and award. What if such an action has been "commenced" by this litigious Receiver? Does any presumption arise from its mere commencement (and that is all that is shown) of success? Or that it will result otherwise than in consuming the assets of this corporation and keeping it in the Receiver's hands for the next five or six years? Such an action as has been brought in the First Department cannot be reached there in the present condition of the calendar for *three years;* and the Trial Court has already refused to advance it—A very severe penalty to impose upon the Appellants, who were entitled to the immediate payment of their claim by the terms of the Final Order, merely because the Receiver sees fit to commence an action against them.

Oh! but the Receiver alleges another ground for

his stay: he says with engaging frankness and simplicity that he has "under preparation" still another action against "certain persons filling fiduciary positions to the corporation;" (for most excellent cause, one is led to suspect) and he *may yet determine* to make Mr. Comstock a party to it. (See Record, pp. 6 and 7, fols. 18 and 19).

Were ever more preposterous grounds suggested for staying the enforcement of any adjudication, however informal?

In his moving Affidavit the Receiver very modestly asked for a stay until the next term of this Court (fol. 19). In his Order to Show Cause he asked for a stay until the determination of the action—which will be from three to five years, *not less than three*. While by the Order entered by the Receiver, the Court is made to go the full length of *vacating* the final Order, *upon these grounds;* and then after so doing, of undertaking the creative task of reconstructing it out of its own vacuity.

That Courts of Equity have not in the past been wont to act in vacating or suspending their decrees upon such frivolous grounds, or to administer their jurisdiction upon such apprehensive principles, seems to be too clear to require the citation of authorities.

What seems equally clear is that if the action, now brought or contemplated against Messrs. Olney and Comstock, or Mr. Comstock individually, is so related to the Proceeding which terminated in their favor by the Order of October 25th, 1902, as to suggest the necessity of staying payment under that final Order until that action can be determined, then it is evident that it is a matter which would have constituted a defense to the claim of Olney & Comstock in that Proceeding and should have been there set up and litigated. There is no allegation that the facts were not then known.

> "There is no doubt of the general rule that
> "a judgment of a court of competent jurisdic-

"tion is final and conclusive upon the parties,
"*not only as to the issues actually determined,*
"*but as to every other question which might or*
"*ought to be litigated.*"

Stokes *v.* Foote, 172 N. Y., 344.

Citing Embrey *v.* Connor, 3 N. Y., 511; White *v.* Coatsworth, 6 N. Y., 137; Pray *v.* Hageman, 98 N. Y., 351; Jordan *v.* Van Epps, 85 N. Y., 427; Smith *v.* Smith, 79 N. Y., 634; Clemens *v.* Clemens, 37 N. Y., 74; Lorillard *v.* Clyde, 122 N. Y., 41; Rich *v.* Cochran, 151 N. Y., 122.

The case is directly within the principle of Gates *v.* Preston (41 N. Y., 113);

Pray *v.* Hegeman (98 N. Y., 358);

Duchess of Kingstons Case (11 State Trials, 261).

The test is, "*has there been a judicial decision*" between the parties where the question was *involved*.

And the same is true of Orders which when they decisively and conclusively fix the rights of the parties are as conclusive as judgments.

Aldridge *v.* Walker, 73 Hun, 281;
Pape *v.* Schofield, 77 Hun, 236—Affd. 145 N. Y., 598;
Oppenheim *v.* Lewis, 20 App. Div., 332;
Curlos *v.* Gibbons, 130 N. Y., 447;
Furman v. Furman, 9 App. Div., 94—153 N. Y., 309;
Matter of Gall, 40 App. Div., 114;
Dwight *v.* St. John, 25 N. Y., 203;
Dutton *v.* Smith, 10 App. Div., 566.

Secondly: In viewing the Order of October 25, 1902, with respect to the *power* of this Court to vacate or suspend it, be it first observed that the Order was *not interlocutory* in any sense, but essentially *final*. It was made at the conclusion of a very spirited and protracted trial before the Referee, and

it disposed of all the questions relating to the merits of the claim of Olney & Comstock, and ended the proceeding by directing the payment of a fixed sum to them, at once, and upon its presentation.

What element of finality did it lack as an adjudication?

Or, to test the question from the opposite point of view, in what essential respect was it *interlocutory or inchoate?* It potentially yielded the highest fruits of an adjudication; a positive mandate for the payment of the claim demanded.

It falls within the category of final orders, which are made, in what might be termed, *special proceedings arising out of special proceedings;* when an attorney's rights, as such, to compensation in a special proceeding are regarded as a separate matter, although litigated under the same title, such as

Matter of Regan, 167 N. Y.;
Matter of Fitzsimons, 173 N. Y.;
Hoey *v.* McDonald, 109 U. S., 154.

It is now well settled by those recent decisions that such Orders have the character of *finality*, which entitles them to review in the Court of Appeals—the supreme test.

The Order of October 25, 1902, then being in the nature of a final Order, there was *no power* in the Court at a subsequent term to vacate or modify it. And certainly not upon such a motion.

The rule seems to be well established that a judgment or final Order cannot be amended by a subsequent Order as to a material matter if it attempts to conclusively fix the rights of the parties.

Standard *v.* Hubbell, 123 N. Y., 520;
Heath *v.* Bed. Scty., 146 N. Y., 260;
Ray *v.* N. Y. Ext. Co., 34 App. Div., 3;
Fanun *v.* McNally, 33 App. Div., 607;
Peters *v.* Carpenter, 25 Hun, 529;
Bohlen *v.* Met. El. R. Co., 121 N. Y., 546;
Matter of Underhill, 117 N. Y., 471.

Section 723, Code Civ. Pro., was designed to apply only to the correction of mistakes in process, pleadings, &c. (146 N. Y., 263; 121 N. Y., 546). In Standard v. Hubbell (supra) the Court said:

> "But it would seem inconsistent with principle that a Trial Court, after its function, has been terminated by an award of final judgment, should be permitted to amend the judgment in matter of substance for error committed on the trial or in the decision *or by amendment to limit the legal effect of the judgment to meet some supposed equity subsequently called to its attention, citing Genet v. Pres. D. & H. Co., 113 N. Y., 477.*"

Which is just what was attempted to be done by the Order appealed from.

It is made very clear by the opinion of Judge ANDREWS in the above case that the well recognized power of Courts to "*control*" their own judgments is a limited power designed for the correction of errors and the prevention of fraud, but is in no sense to be construed as a power of *revision* or *review*. He says at p. 526:

> "The power of a Court of original jurisdic-
> "tion to set aside and vacate its judgments in
> "particular cases is a part of its inherent and
> "recognized jurisdiction, and in many cases is
> "regulated by statute. When exercised the
> "parties are remitted to the position they occu-
> "pied before the judgment was rendered
> " * * * *The trial judge has no revisory*
> *"or appellate jurisdiction to correct by amend-*
> *"ment errors in substance affecting the judg-*
> *"ment.* He may correct merely errors, as a
> "mistake in the entry of judgment," &c.

No fraud or mistake was set forth in the moving papers in the case at bar, only the mere naked fact

that the Receiver had "commenced an action against Olney & Comstock for $2,700."

And yet it was deemed sufficient by the Special Term Judge to justify the vacature of the final Order of October 25th, and the making of an entirely new Order which was utterly destructive and subversive of the Court's former decision on the Referee's report.

THE SUBSTANTIAL RIGHTS OF THE APPELLANTS VIOLATED BY THE ORDER APPEALED FROM, THEN, WERE AS FOLLOWS:

1st. The right, in event of an adverse decision of the motion, to have only such Order entered as the appellants had notice to oppose and upon the papers moved on.

2d. The right to *hold* the final order with all its benefits, confirming the Referee's report and awarding them the amount of their claim in its integrity, until reversed on appeal, or vacated or corrected for such grounds of error or fraud as are commonly recognized by the Courts of Common Law and Equity.

3d. The right to preserve the legal effect of the Order of Oct. 25 in so far as to put an end to the litigation between the appellants and the Receiver by force of the rule of *res adjudicature*.

It will not do to say that because the Court permits the Appellants to apply for $1,000 at some subsequent time that no damage has been done them; that would be to beg the whole question and to say in substance that it does not harm a litigant to have a controversy once settled by adjudication, again opened and be exposed a second time to its hazards and delays and expense; and in effect to affirm that a bird in the bush is worth two in the hand.

Referring to the beneficent principle of the law

which conserves the repose of adjudicated questions the Court of Appeals in Webb *v.* Bucklew, 82 N. Y., 559, said:

> "The general rule is intended to prevent lit-
> "igation, and preserve peace: and were it other-
> "wise men would never know when they might
> "repose with security on the decisions of courts
> "of justice: and judgments solemnly and de-
> "liberately given might cease to be revered as
> "no longer the end of the controversy and evi-
> "dence of right."

POINT IV.

If the Court is now of the opinion, upon examining the whole case, that the presence of improper recitals in the order affects substantial rights of the appellant on this appeal, adversely, it is prayed that it may, in the interests of justice and on its own motion, order a reargument of the former appeal from the order denying appellant's motion to resettle the order now appealed from, for the following reasons:

In the valued opinion of Mr. Justice WOODWARD, handed down at the April Term, holding that the Order denying the appellant's motion to resettle the Order now appealed from was not appealable because it did not affect a substantial right, that very learned and careful judge in distinguishing the case of Gleason v. Smith (34 Hun, 547) and the N. Y. Rubber Co. v. Rothey (112 N. Y., 592) which affirmed and followed it, places the distinction upon the fact that those cases were Orders denying motions to resettle *cases on appeal*, and that appeals in such cases are *expressly allowed by Section 1347, Sub. Div. 1, of the Code of Civ. Pro.*

The Court evidently overlooked the fact that Gleason v. Smith was decided in January, 1885,

while Sub Div. 1 of Sec. 1347 was not enacted until 1896. Nearly ten years thereafter.

So were appellants not correct in saying, that Gleason v. Smith, which was the pioneer case and has been many times cited and followed, was a leading and controlling authority for the practice of appealing from Orders refusing to resettle *cases*, unaided by statute?

Is it not also true that an improper recital in an *Order* may affect as substantial a right as certainly and seriously as the improper insertion of matter in a case on appeal? What is the difference in principle?

Or what better opportunity does a trial judge have for knowing what evidence was taken at a trial than what was taken or read on the hearing of a motion? Some of the most important questions now come up on appeals from Orders in special proceedings. What is good for a *case* ought to be good for a *special proceeding*. It is the case of the sauce and goose and the gander, over again.

Judge DANIELS in Gleason v. Smith, put the decision of the Court upon the very point that the Court had *no discretion* to put anything into a case on appeal which did not occur; and held that the right to a proper record was as sacred and substantial a right as the right of appeal itself. Which seems perfectly obvious.

In Waltham Manuf, Co. *v.* Brady (67 App. Div., 102), Judge PATTERSON expressed the opinion that the appeal did not lie from an Order refusing to resettle an Order; but it does not appear to have been necessary to the decision of the case: and an examination of the Briefs of Counsel will show that neither Gleason *v.* Smith nor N. Y. Pub. Co. *v.* Rothey were called to the attention of the Court.

Place *v.* Hayward, 100 N. Y., 626, unlike Gleason *v.* Smith and N. Y. Pub. Co. *v.* Rothey, was purely a question of *discretion* which the Court *had the right to decide*.

The doctrine of Gleason v. Smith is, that as to the

making up a proper record or recitals as to what occurred at the trial, there is absolutely *no right* to decide, to add, or exclude from the record of the decision any material matter the existence of which is not in dispute.

POINT V.

The order should be reversed, with costs.

J. NOBLE HAYES,
Counsel for the Appellants,
Olney & Comstock.

Chas. P. Young, Printer, 108 Fulton St., N. Y.—(Tel. 1275 John)

James F. Curran.

Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

In the Matter

of

The Application of the Directors of the NATIONAL GRAMOPHONE CORPORATION of New York for a Voluntary Dissolution.

BRIEF FOR RESPONDENT RECEIVER.

Statement of Facts.

This is an appeal from an order made by Mr. Justice Keogh, dated January 6th, 1903, and entered January 8th, 1903, vacating an order of October 25th, 1902, and granting other relief (fols. 4-10).

The facts, as disclosed by the printed papers on appeal, are these:

On October 25th, 1902, upon motion of Messrs. Olney & Comstock, attorneys for the petitioning directors of the National Gramophone Corporation, Judge Keogh made an order in this proceeding confirming the report of a certain Referee herein, Thomas F. Curran, and directing Eugene V. Daly, the permanent receiver of the said corporation appointed herein, to pay out of the

corporate estate to Messrs. Olney & Comstock, $1,762.32 "in payment of their services and disbursements in the matter of the dissolution of the National Gramaphone Corporation of New York to April 5, 1902" (fols. 104-108).

Before a month had passed after the making of this order, and on November 12th, 1902, the Receiver, respondent herein, made and presented to Judge Keogh an affidavit declaring that it would not be *safe* for him to pay the amount directed to be paid Olney & Comstock by the above order of October 25th until the time to appeal of the Attorney General and the other parties herein had expired (fol. 17). The Receiver's affidavit further asked the Court's instructions as to the propriety of *his* appealing from the order of October 25th "and refers to the testimony and brief of the Receiver as to this point" (fol. 17), meaning the testimony and brief of the Receiver given before the Referee Curran and upon the appellants' former motion for the order of October 25th. The Receiver's affidavit further shows that he has as such Receiver instituted an action for money had and received against Messrs. Olney & Comstock (the appellants) to recover $2,700, and prays for a stay of the order of October 25th, until the determination of that action and also until the expiration of the time of the parties to appeal from the order of October 25th (fol. 18). The Receiver's affidavit further shows that he is preparing to bring suit for maladministration of the corporation's affairs against persons who held fiduciary relations with it, and states that he has not yet made up his mind whether or not to make Mr. Comstock, of Olney & Comstock (the appellants), one of the defendants in that proposed suit (fols. 18-19).

Upon this affidavit, and upon all the papers and proceedings herein, Judge Keogh made an order to show cause, dated November 15th, 1902, requiring Messrs. Olney & Comstock, the Attorney General

and other parties to show cause why a stay should not be granted against the Receiver's "making *any* payment to Messrs. Olney & Comstock" under the order of October 25th until the final determination of the Receiver's said action against that firm and of any appeal that might be taken from the order of October 25th, "and until such other date as to the Court may seem proper" (fols. 11–13). The order to show cause also required the parties named to show cause why the Court should not instruct the Receiver as to *his* appealing or prosecuting an appeal from the order of October 25th, and "why the Court should not otherwise instruct the Receiver in the premises or make *such other order* in the premises as to the Court may seem just" (fol. 14). A stay was granted in the meantime against all proceedings under the order of October 25th (fol. 14).

Upon the duly adjourned return day of this order to show cause Judge Keogh made an order dated January 6th, 1903, now appealed from by the petitioning directors and Messrs. Olney & Comstock, alleged to be "persons aggrieved" (fol. 116). No affidavits in opposition to the motion were filed by the appellants.

Subsequently the appellants made a motion to resettle the order of January 6th, 1903, upon which motion practically the same questions arose which arise on this appeal. Judge Keogh denied the motion to resettle, and these same appellants appealed to this Court. The result was that this Court very recently overruled the appeal and affirmed the order appealed from, rendering an opinion written by Judge Woodward, not yet reported but handed down on April 24th, 1903, in which the facts and law are fully discussed.

POINTS.

I.

Rule 25 of the General Rules of Practice does not warrant this appeal.

The order appealed from was made by Justice Keogh, who had himself made the order of October 25th, and who was thoroughly familiar with the whole proceeding. Due proof of service of the Receiver's affidavit and of the order to show cause, already described, upon Messrs. Olney & Comstock, the Attorney General and the other parties is recited in the order (fol. 6). Messrs. Olney & Comstock were, as the order recites, present at the hearing, and, through counsel, Mr. Leslie R. Palmer, took part therein (fol. 6). What happened at the hearing is fully set forth in the opinion of Judge Woodward already referred to.

The appellants will probably rely here, as they did in their appeal from the order denying resettlement, on Rule 25 of the General Rules of Practice, and will doubtless contend that the Receiver's affidavit of March 12th, 1903 (fols. 16-20), was defective and that his order to show cause must fall, for the reason that he had failed to state in the affidavit that no other or previous application had been made for such order to show cause.

This contention, however, was fully disposed of by this Court on the former appeal and we respectfully refer to its opinion.

It is well established that non-compliance with Rule 25 of the General Rules of Practice, requiring the moving party to state that no previous application has been made, is a mere irregularity and does

not compel the Court to refuse the order or to vacate it when granted.

Bean v. *Tonnelle*, 24 Hun, 353.
Skinner v. *Steele*, 88 Hun, 307.
Wooster v. *Bateman*, 53 St. Rep., 562.
People ex rel. Brodie v. *Cox*, 14 St. Rep., 632.
Pratt v. *Brady*, 10 Misc., 445.

The above objection, however, seems to have satisfied the appellants, for, at the argument upon the Receiver's order to show cause, they failed to file any affidavits in opposition to the motion. In other words, the *attorneys* who are now appealing to this Court as "persons aggrieved" by the order giving instructions to the Court's receiver in a matter relating to allowances for services in this proceeding to be paid out of the corporate estate, chose to stand on technical objections when the motion was before the Court and declined to make any attempt to satisfy the Court of their right to receive the large sum of $1,762.32 as compensation, although the order to show cause and the Receiver's affidavit, already quoted, had substantially notified them that the order of October 25th, and all the proceedings upon which it was based, were to be reconsidered; that the whole question of their right to any allowance was to be re-opened and re-examined by Judge Keogh; and that their own liability to the Receiver for $2,700 and the possibility of at least one of their firm being made a defendant in a suit alleging maladministration of the corporation's affairs were to come before the Court on the return day. The Receiver's affidavit and the order to show cause had referred to these matters as included in the subject concerning which the Receiver was praying for directions from the Court who had appointed him. The Receiver's affidavit had referred to the testimony taken before the Referee upon the

confirmation of whose report the order making the appellants' allowance had been based, and the appellants had been notified by that affidavit and by the order to show cause that Judge Keogh would be asked to modify his former order based upon such Referee's report, to stay its execution, to give the Receiver full instructions as to the future recognition of that order, and, indeed, perhaps to vacate that order altogether, since he was asked by the Receiver "to make such other order in the premises as to the Court may seem just" (fol. 14.) Yet the appellants chose to rely on technical objections and to refrain from assisting the Court in coming to a conclusion in the premises. They cannot complain, in view of their recalcitrance, if the Court, with the Receiver's assistance, and in the light of his own intimate knowledge of the situation, entered the order which he considered to be the just and proper order under the circumstances.

II.

The appellants have not been prejudiced by the order of January 6th, 1903, and the Court clearly had power to reconsider and revoke its own order of directions to the Receiver.

That the appellants were not prejudiced was squarely decided by this Court on the former appeal when the record enabled the appellants to raise many objections which they could not raise on the present appeal, and which we do not therefore discuss as we did in our former brief.

"It is urged by the appellants," said this Court in its opinion, "that the recitals of the order of January 6 do not truthfully and fairly state the

proceedings had upon the argument of the motion for said order; that certain proper recitals were omitted therefrom; that certain affidavits are therein referred to as having been read on the said argument which were not served with the motion papers, nor in fact read at that time; and that the order as entered does not conform to the Court's decision, and was improperly entered without notice of settlement. While it is true that preliminary or other formal objections taken upon the argument and ruled on by the Court should ordinarily be recited in an order for purposes of review on appeal, we do not believe that the appellants were in any way prejudiced by the omission from the recitals of the order of January 6, of the objection relative to the receiver's failure to comply with Rule 25. * * * THE ORDER OF JANUARY 6, OF WHICH RESETTLEMENT WAS REFUSED, LEAVES THE APPELLANT FREE TO MAKE FURTHER APPLICATION FOR THE ADDITIONAL AMOUNT TO WHICH THEY DEEM THEMSELVES ENTITLED; IT IMPOSES NO CONDITIONS THAT CANNOT BE EASILY FULLFILLED, AND AFFECTS NO SUBSTANTIAL RIGHT OF THE APPELLANT."

This order of January 6, it will be recalled, is the very order from which the present appeal is taken, and the above is a direct decision by this Court that said order affected no substantial right of the appellants.

There was no reason why Judge Keogh should not order a re-submission. The Court's Receiver was praying for it, and declaring that he could not safely obey the order of October 25th. Judge Keogh himself had made the order of October 25th, fixing the appellants' allowance as attorneys for the corporation in this statutory proceeding. He had full control of the parties and of the subject-matter, and had an absolute right to re-open the whole inquiry *of his own motion*, or upon application of the Court's Receiver, and to consider, on such re-opening, such papers and proceedings bearing on the points involved as he saw fit. The cases cited in the Third point of this brief establish this principle.

In point of fact the order of January 6th was precisely the proper order to be made on the motion. It simply vacates the old order, and makes a new allowance of $750 in lieu of the original $1,762.33, *and preserves the appellant's rights to make a future application for $1,000 more.* They are not aggrieved by this requirement. The Receiver had called the Court's attention to the reasons why the allowance should never have been granted, and was asking for instructions as to whether he should appeal. The Court practically said: "No, you need not appeal, for I will vacate the old order, direct payment of a portion of the allowance at present and give leave to Messrs. Olney & Comstock to make out their further rights in future."

As appears from the report of Referee Curran (fols. 109-113), the amount of the allowance ($1,762.32), contained in the order of October 25th, consisted of $1,500, allowed as the value of the services of Messrs. Olney & Comstock, and $262.32 as their disbursements; so that it appears that no part of the allowance which the Court, in the order of October 25th, directed the Receiver to pay to Messrs. Olney & Comstock consisted of costs.

Without undertaking to dispute the power of the Court in a case of this kind to make an allowance out of the funds in the Receiver's hands to the attorneys of the petitioners on whose motion such Receiver has been appointed, it must be apparent that the right to such allowance is given to the attorneys neither by virtue of any positive statute law, as in the case of costs, nor of any contract entered into between those attorneys and any person representing the Court. The question as to whether an allowance shall be made in such cases, the amount of such allowance, the question as to when it shall be paid and how it shall be paid, are all questions addressed to the *discretion* of the Court administering the receivership fund. That Court is properly the Court sitting

at Special Term, and we take it that the Appellate Division will not interfere with the discretion of the Court below in making orders governing the conduct of its Receivers in dealing with the funds in his hands, unless it appears that such orders were palpably improvident or improper. The Appellate Court will not undertake to administer an estate in the hands of Receivers, for otherwise its time would be largely occupied with questions of detail which could be disposed of by the Judge at Special Term, and especially should the Appellate Court not be so occupied in considering questions which do not arise out of contract rights or rights capable of being enforced in a Court of law, and which are merely matters of discretion.

In the present case, as we have said before, there is no question of statutory costs involved, and there is no question of contract right. Therefore, there is no absolute right at issue before the Court. There was no vested right in the appellants that the Court should make them an allowance. The Court, in making any allowance in this case, did so more or less as an aid to the petitioners in paying for professional services which it thought the petitioners had properly instituted for the benefit of the persons interested in the corporation's property. It is apparent that a Judge sitting at Special Term, who has previously made an order granting an allowance in a case like this, and who is called upon to reconsider his former action, has before him and in his mind many matters which do not and cannot appear in the papers upon which an appeal is made. Judge Keogh made the order of October 25th, having before him at that time the minutes of the evidence taken before the Referee and the Referee's report. No doubt he very properly took into consideration what was in those papers upon the occasion of this application for a re-settlement of his former order, and the affidavit of the

Receiver (fols. 16-19), upon which the order to show cause was granted, referred the Court to the testimony taken at the hearings. This testimony is not printed in the present case; but this Court surely could not say that the Judge below acted improperly in considering this testimony, which he had before considered in making an order that had to do with the administration of a fund in Court and in the disposition of which others were interested besides the Receiver who had the fund in his possession and the claimants who are addressing a prayer for an allowance to the discretion of the Court.

III.

The order of January 6th, 1903, is not appealable, because that order does not affect any substantial right of the appellants and because it was purely discretionary.

No appeal lies to this Court from an order of Special Term unless it affects a substantial right.

Code Civil Proc. Sec. 1347, Subd. 4.

This Court decided on the former appeal that the order of January 6th, 1903, did not affect any substantial right of the appellants.

"No substantial right of the appellants being affected," said the Court, "the Court cannot disturb the order appealed from. 'Whether a Court shall modify or change an order already made by it is a question addressed to its discretion, and over its exercise an appellate court has no control. (*Place* v. *Hayward*, 100 N. Y., 626). To the same effect are *Waltham Manufacturing Co.* v. *Brady* (67 App. Div., 102); *Walsley* v. *Houck*, (27 App. Div., 630); *Sexton* v. *Bennett* (17 N. Y. Supp., 437)."

IV.

The order appealed from should be affirmed with costs.

TURNER, ROLSTON & HORAN,
For the Receiver-Respondent.

JAMES F. HORAN,
Of Counsel.

In the Matter of the Application of the Directors of THE NATIONAL GRAMOPHONE CORPORATION OF NEW YORK for a Voluntary Dissolution.

PETER B. OLNEY and GEORGE CARLTON COMSTOCK, Copartners, Composing the Firm of OLNEY & COMSTOCK, Appellants; EUGENE V. DALY, as Receiver of THE NATIONAL GRAMOPHONE CORPORATION OF NEW YORK, Respondent.

Order directing a receiver of a corporation to pay to the attorneys procuring its dissolution a certain sum for their services — the court may on the receiver's application make a further order directing that only part thereof be immediately paid.

The attorneys for the petitioners, in a proceeding instituted by the directors of a corporation for the voluntary dissolution thereof, procured an order requiring the permanent receiver to pay them the sum of $1,762.32 for their services and disbursements. Thereafter, on the receiver's application, the justice who made the order granted another order requiring the attorneys to show cause why the payment should not be stayed and why certain other relief should not be granted.

On the return of the order to show cause the court directed a rehearing of the entire matter, and, as a result of such rehearing, made an order setting aside the previous order directing the payment of the $1,762.32 by the receiver and directed that the attorneys should be presently paid only the sum of $750, but that they should have leave to make a further application for an additional allowance of $1,000.

Held, that the order on the rehearing should be affirmed;

That it was discretionary with the court to direct the receiver to pay to the attorneys presently the whole or only a portion of their claim;

That the court had power, on the return of the order to show cause, to direct a rehearing, and, as a result of such rehearing, to change the decision made on the original application.

APPEAL by Peter B. Olney and another, copartners, composing the firm of Olney & Comstock, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 8th day of January, 1903, vacating an order theretofore entered in said clerk's office confirming the report of a referee appointed in the above-entitled action.

J. Noble Hayes, for the appellants.

[illegible] for the respondent.

HIRSCHBERG, J.:

On the 25th day of October, 1902, the appellants, as attorneys for the petitioners in this proceeding, which was instituted for the voluntary dissolution of the corporation, procured an order requiring the permanent receiver to pay them the sum of $1,762.32 for their services and disbursements. Thereafter, on the receiver's application, an order was granted by the justice who made the prior order, requiring the appellants to show cause why such payment should not be stayed, why the receiver should not be instructed by the court in certain particulars relative to such payment and to the prosecution of an appeal from the order, etc., and why such further order should not be granted as to the court might seem just. On the return of the order to show cause the matter was heard on the papers only upon which it was granted, and before the same justice who granted the order of October 25, 1902. Being then of opinion on further examination of the papers that the appellants' entire claim should not be paid at the present time, the learned justice made the order now appealed from by which the order of October 25, 1902, is set aside, and the receiver is directed to pay to the appellants on their claim only the sum of $750, but with leave granted to them to make further application for an additional allowance of $1,000.

It is quite apparent that the change in the determination of the appellants' application for payment has been influenced by a doubt in the mind of the learned justice as to whether it would be safe for the receiver to pay the entire claim at present, in view of certain suits pending and contemplated, and in view of other matters not necessary to detail. The result reached was clearly within the discretion of the court. The appellants insist, however, that it was not within the power of the court to change its original determination on the hearing of the motion presented by the order to show cause, inasmuch as the relief finally granted was not within the contemplation of the motion and was in effect the rendering of a different decision upon the merits from that which was made on the previous hearing. The order appealed from recited that on the return of the order to show cause the court directed a resubmission of the whole matter covered by the order of October 25, 1902, and that the order appealed from was made on such resubmission. It

was certainly within the power of the court to direct such rehearing under the circumstances. The recital to the effect that he did so is conclusive of the fact if for no other reason because the appellants applied at the Special Term for a resettlement of the order by the striking out of this recital among others, and an order refusing such resettlement was affirmed by this court on appeal. (*Matter of National Gramophone Corporation*, 82 App. Div. 593.) The evidence in support of the appellants' claim was taken before a referee and is not returned in the present record, so that the merits of the application are not under review. There is sufficient in the papers to indicate reasonable ground for postponing the payment of a part of the claim until the accounts between the parties are so far adjusted as to make final payment safe and proper, and the action taken being within the jurisdiction of the court as represented by the justice by whom the first decision was rendered, the order should be affirmed.

GOODRICH, P. J., BARTLETT, WOODWARD and HOOKER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

MARY E. TAYLOR, Appellant, *v.* WILLIAM SMITH, Respondent.

Carrier's lien — to what it attaches — what disposition should be made by a cartman in New York city of property on which a lien is claimed.

A carrier's lien for services is limited to articles with respect to which he rendered services as a carrier, and does not extend to articles belonging to his employer of which he offered to take charge, but in connection with which he did not render any services as a carrier.

A public cartman in the city of New York, who seeks to obtain a lien under the ordinances of that city upon property carried by him, should convey the property either to the property clerk or the police department or to a convenient storage warehouse and should not keep it in his own possession.

APPEAL by the plaintiff, Mary E. Taylor, from a judgment of the Municipal Court of the city of New York, borough of Queens, in favor of the defendant, entered on the 23d day of January, 1903.

c. 611, p. 761, of the Laws of 1875, was not repealed. Sections 1, 3, 6, 7, 8, 9, and 30 to 39, both inclusive, were alone repealed. In the fifty-eighth section of the stock corporation law (chapter 564, p. 1079, of the Laws of 1890) is incorporated the provision as to the liability of stockholders in a stock corporation contained in section 25, c. 611, p. 761, of the Laws of 1875, and it is re-enacted as section 55, c. 688, p. 1841, of the stock corporation law of 1892. In the revision of the corporation laws it appears to have been the purpose to include in the general corporation law provisions which would apply to corporations generally; in the stock corporation law, provisions that relate to or affect all stock corporations; and in the business corporation law, particular provisions that would affect that class of corporations. But the statute of limitations contained in the fifty-fifth section of the stock corporation law we conceive to be a general provision, which would affect full liability corporations, among others.

We are therefore of the opinion that the demurrer was improperly sustained, and that the interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs. All concur.

(82 App. Div. 593)

In re DIRECTORS OF NATIONAL GRAMOPHONE CORP. OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. April 24, 1903.)

1. ORDER TO SHOW CAUSE—APPLICATION—IRREGULARITIES—RECITAL IN ORDER—PREJUDICE.

The failure of an applicant for an order to show cause to comply with the requirement of rule 25, Gen. Rules Prac., that he shall state that no previous application for the order has been made, is a mere irregularity, and the omission, in the order made on such application, to recite that the application was objected to because of such failure, is not prejudicial to the objecting party.

2. AMENDMENT OF ORDER—DISCRETION—APPEAL.

Where a court vacated an order by which it had directed a receiver to pay certain moneys, a motion to resettle the order of vacation is addressed to the discretion of the court, and its decision thereon will not be reversed where no substantial right of the appellant is affected thereby.

Appeal from Special Term, Westchester County.

Motion by Peter B. Olney and another to resettle an order which vacated an order directing the receiver of the National Gramophone Corporation of New York to pay them certain moneys. From an order denying the motion, they appeal. Affirmed.

Argued before GOODRICH, P. J., and WOODWARD, HIRSCHBERG, and HOOKER, JJ.

J. Noble Hayes (Leslie R. Palmer, on the brief), for appellants.

James F. Horan, for respondent.

WOODWARD, J. On October 25, 1902, upon motion of the attorneys of the petitioning directors of the above-named corporation, an order was made at Special Term directing the permanent receiver of said corporation to pay out of the fund in his hands, as such receiver, to said attorneys, the sum of $1,762.32, "in payment of their services and disbursements in the matter of the dissolution of the Na-

tional Gramophone Corporation of New York to April 5, 1902." On November 12, 1902, the receiver presented to the same judge who made the order of October 25th his affidavit declaring that for certain reasons therein stated he could not with safety pay the amount directed to be paid by that order, asking the court's instructions in certain matters pertaining to the receivership, and praying for a stay of the order of October 25th until the determination of certain matters specified in said affidavit. Upon this affidavit and all the records and proceedings in said matter an order was made requiring the attorneys upon whose motion the order of October 25th was made to show cause, at a time and place therein stated, why an order should not be made as prayed for by said receiver. The motion under this order to show cause came on for hearing on January 6, 1903, before the same judge who made the order of October 25th. The attorneys to whom payment was directed by the order of October 25th appeared, and verbally opposed the granting of the prayer of the receiver, urging as a preliminary objection that the moving papers were fatally defective, in that they failed to state whether a previous application for the order had been made, as required by rule 25 of the General Rules of Practice. No affidavits were read or filed by the appellants. On January 6, 1903, an order was made, in response to the prayer of the receiver, vacating the order of October 25th, and directing payment of $750 to the attorneys to whom payment of $1,762.32 had been directed by the order of October 25th upon performance by them of certain conditions therein specified, "with leave" to the said attorneys "to make further application for an additional allowance of $1,000." On January 17, 1903, upon the return of an order to show cause, granted on the application of the attorneys claiming to be aggrieved by the order of January 6th, a motion to resettle said order was denied by the same judge who had made both of the previous orders. From this order denying resettlement this appeal is taken.

It is urged by the appellants that the recitals of the order of January 6th do not truthfully and fairly state the proceedings had upon the argument of the motion for said order; that certain proper recitals were omitted therefrom; that certain affidavits are therein referred to as having been read on said argument which were not served with the motion papers, nor in fact read at that time; and that the order as entered does not conform to the court's decision, and was improperly entered without notice of settlement. While it is true that preliminary or other formal objections taken upon the argument and ruled on by the court should ordinarily be recited in an order for purposes of review on appeal, we do not believe that the appellants were in any way prejudiced by the omission from the recitals of the order of January 6th of the objection relative to the receiver's failure to comply with rule 25. It has been repeatedly held that this defect is merely an irregularity. Bean v. Tonnelle, 24 Hun, 353; Skinner v. Steele, 88 Hun, 307, 34 N. Y. Supp. 748; Wooster v. Bateman, 53 N. Y. St. Rep. 562, 24 N. Y. Supp. 112; People ex rel. Brodie v. Cox, 14 N. Y. St. Rep. 632; Pratt v. Bray, 10 Misc. Rep. 445, 31 N. Y. Supp. 465. The order of January 6th, of which resettlement was refused, leaves the appellants free to make further application for the additional

amount to which they deem themselves entitled. It imposes no conditions that cannot easily be fulfilled, and affects no substantial right of the appellants. In substance it is quite as favorable to them as the order they themselves propose as a substitute.

No substantial right of the appellants being affected, this court cannot disturb the order appealed from. "Whether a court shall modify or change an order already made by it is a question addressed to its discretion, and over its exercise an appellate court has no control." Place v. Hayward, 100 N. Y. 626, 3 N. E. 199. To the same effect are Waltham Manufacturing Co. v. Brady, 67 App. Div. 102, 73 N. Y. Supp. 540; Wadsley v. Houck, 27 App. Div. 630, 50 N. Y. Supp. 167; Sexton v. Bennett (Sup.) 17 N. Y. Supp. 437. These decisions are not in conflict with Gleason v. Smith, 34 Hun, 547, and New York Rubber Co. v. Rothery, 112 N. Y. 592, 20 N. E. 546. In these cases the orders appealed from were orders denying motions to resettle cases on appeal. From such orders appeals are expressly allowed by section 1347, subd. 1, of the Code of Civil Procedure. The order appealed from should be affirmed.

Order affirmed, with $10 costs and disbursements. All concur. HIRSCHBERG, J., in result.

(82 App. Div. 431)

McGLYNN v. CURRY et al.

(Supreme Court, Appellate Division, Second Department. April 24, 1903.)

1. INSURANCE—LIFE POLICY—GIFTS—SUBSEQUENT ASSIGNMENT.
   Insured obtained a life policy, in which she designated plaintiff as her beneficiary, which policy she at once delivered to plaintiff. The policy was then, at the mutual request of plaintiff and assured, delivered to their uncle for safe-keeping, and was kept by him for several months, when it was sent to assured, with other papers belonging to her, by plaintiff's mother; but there was no evidence of plaintiff's intention thereby to part with its ownership. Four days before insured's death, she assigned the policy to defendant, and notified the insurer that she desired to change the beneficiary. *Held*, that a finding that the delivery of the policy to plaintiff constituted a completed gift of the same to her was justified.

2. SAME—CHARACTER OF PROPERTY—GIFT.
   A life insurance policy is personal property, within Statutory Construction Law, § 4 (Laws 1892, p. 1485, c. 677), and may therefore be made the proper subject of a gift by the insured during her lifetime.

3. SAME—INTEREST OF DONEE.
   Where insured consummated a valid gift of a life insurance policy, the interest of the donee was in the entire contract, with a right to keep the same in force by the payment of premiums, if necessary, and was not merely an interest which extended from year to year, so far as the contract was executed.

4. SAME—PROVISIONS OF POLICY—ASSIGNMENT—WAIVER.
   A provision of a life insurance policy that any assignment thereof must be in duplicate, and both sent to the home office—one to be retained by the company, and the other to be returned—was waived by the company filing an interpleader in an action on the policy, and asking for a determination of the ownership of the fund between the beneficiary and the assignee.

Appeal from Trial Term, Kings County.

relator as highway commissioner, and the board of audit had no power to audit bills for such work. Therefore their audit of the bills in question should be declared illegal.

(87 App. Div. 76)

In re DIRECTORS OF NATIONAL GRAMOPHONE CORP.

(Supreme Court, Appellate Division, Second Department. October 9, 1903.)

1. ORDER TO SHOW CAUSE—VACATING OF ORDER—REHEARING—POWER OF COURT.

On an order to show cause why an order directing the receiver of a corporation in proceedings for a voluntary dissolution to pay a claim should not be vacated, the court may direct a resubmission of the whole matter involved in the order directing the payment of the claim, and postpone the payment of a part of the claim until the accounts between the parties are so far adjusted as to make full payment proper.

Appeal from Special Term, Westchester County.

Proceedings for the voluntary dissolution of the National Gramophone Corporation of New York. From an order vacating an order entered October 25, 1902, directing the payment of a claim by the receiver of the corporation to Peter B. Olney and another, copartners, they appeal. Affirmed.

Argued before GOODRICH, P. J., and BARTLETT, WOODWARD, HIRSCHBERG, and HOOKER, JJ.

J. Noble Hayes, for appellants.

James F. Horan, for respondent.

HIRSCHBERG, J. On the 25th day of October, 1902, the appellants, as attorneys for the petitioners in this proceeding, which was instituted for the voluntary dissolution of the corporation, procured an order requiring the permanent receiver to pay them the sum of $1,762.32 for their services and disbursements. Thereafter, on the receiver's application, an order was granted by the justice who made the prior order, requiring the appellants to show cause why such payment should not be stayed, why the receiver should not be instructed by the court in certain particulars relative to such payment and to the prosecution of an appeal from the order, etc., and why such further order should not be granted as to the court might seem just. On the return of the order to show cause, the matter was heard on the papers only upon which it was granted, and before the same justice who granted the order of October 25, 1902. Being then of opinion, on further examination of the papers, that the appellants' entire claim should not be paid at the present time, the learned justice made the order now appealed from by which the order of October 25, 1902, is set aside, and the receiver is directed to pay to the appellants on their claim only the sum of $750, but with leave granted to them to make further application for an additional allowance of $1,000.

It is quite apparent that the change in the determination of the appellants' application for payment has been influenced by a doubt in the mind of the learned justice as to whether it would be safe for the re-

ceiver to pay the entire claim at present, in view of certain suits pending and contemplated, and in view of other matters not necessary to detail. The result reached was clearly within the discretion of the court. The appellants insist, however, that it was not within the power of the court to change its original determination on the hearing of the motion presented by the order to show cause, inasmuch as the relief finally granted was not within the contemplation of the motion, and was, in effect, the rendering of a different decision upon the merits from that which was made on the previous hearing. The order appealed from recited that on the return of the order to show cause the court directed a resubmission of the whole matter covered by the order of October 25, 1902, and that the order appealed from was made on such resubmission. It was certainly within the power of the court to direct such rehearing under the circumstances. The recital to the effect that he did so is conclusive of the fact, if for no other reason because the appellants applied at the Special Term for a resettlement of the order by the striking out of this recital, among others, and an order refusing such resettlement was affirmed by this court on appeal. Matter of Gramophone Corporation, 82 App. Div. 593, 81 N. Y. Supp. 853.

The evidence in support of the appellants' claim was taken before a referee, and is not returned in the present record, so that the merits of the application are not under review. There is sufficient in the papers to indicate reasonable ground for postponing the payment of a part of the claim until the accounts between the parties are so far adjusted as to make final payment safe and proper; and, the action taken being within the jurisdiction of the court as represented by the justice by whom the first decision was rendered, the order should be affirmed.

Order affirmed, with $10 costs and disbursements. All concur.

(87 App. Div. 72)

PEOPLE v. McCUE.

(Supreme Court, Appellate Division, Second Department. October 9, 1903.)

1. GAMING—POOL SELLING—EVIDENCE.

Where, in a prosecution for pool selling, defendant admitted that the room in which the transactions occurred was a poolroom; that the persons depositing money there were betting on horse races; and defendant was located behind a pigeon hole in a partition, received money from betters, and issued to them tickets containing a printed number, which represented horses designated on score cards posted in the room and circulated by messengers; and the several races were announced from behind the partition in their purported progress, after which the money won was paid to the successful ticket holders—the evidence was sufficient to sustain a conviction, without proof that the entire contributions of the various betters were divided among the winners.

2. SAME.

In a prosecution for pool selling, evidence of remarks made by some of the betters in the room as to the probabilities or chances of winning of some of the horses named on the cards posted and circulated within the room, which were within defendant's hearing, was admissible.